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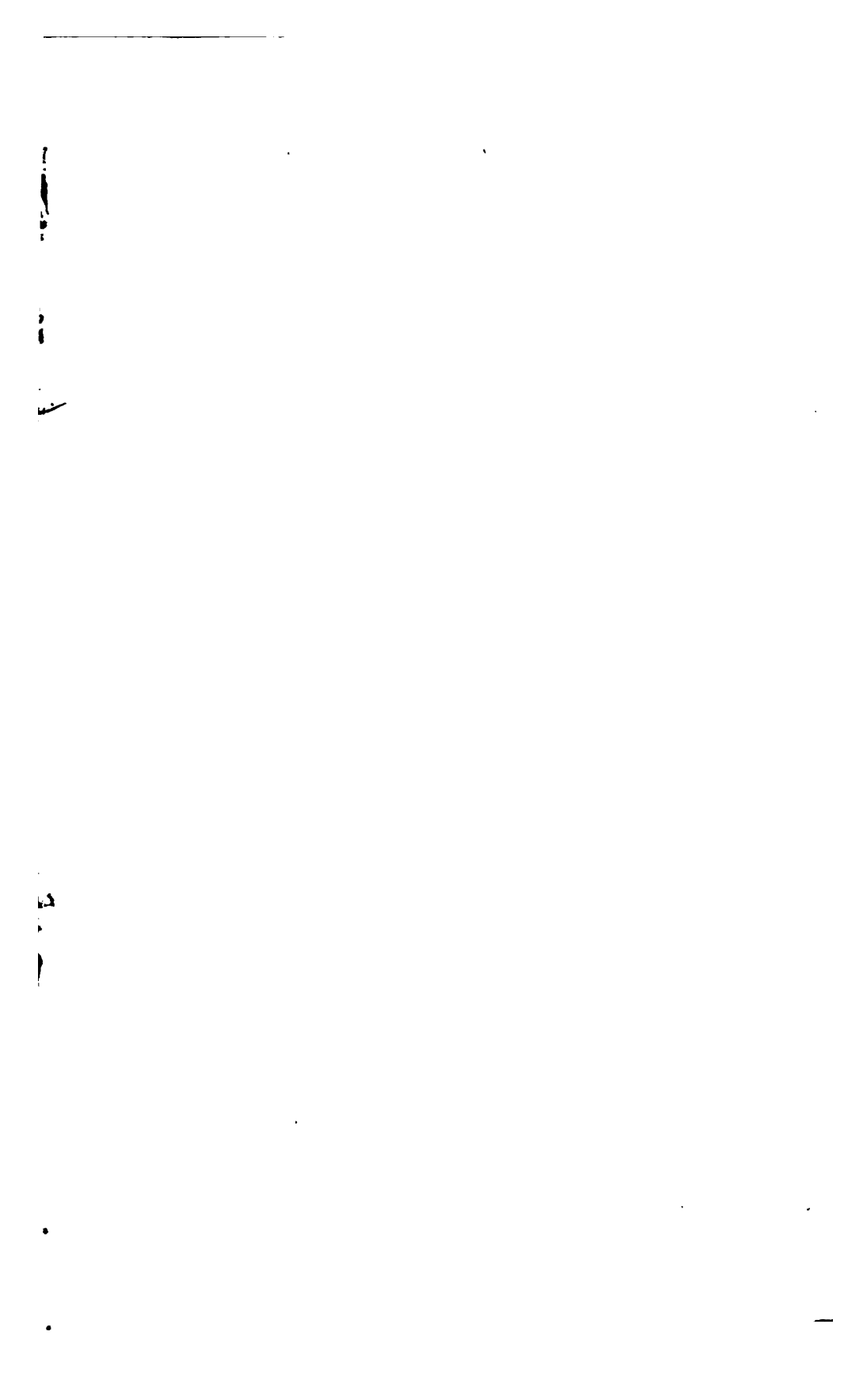
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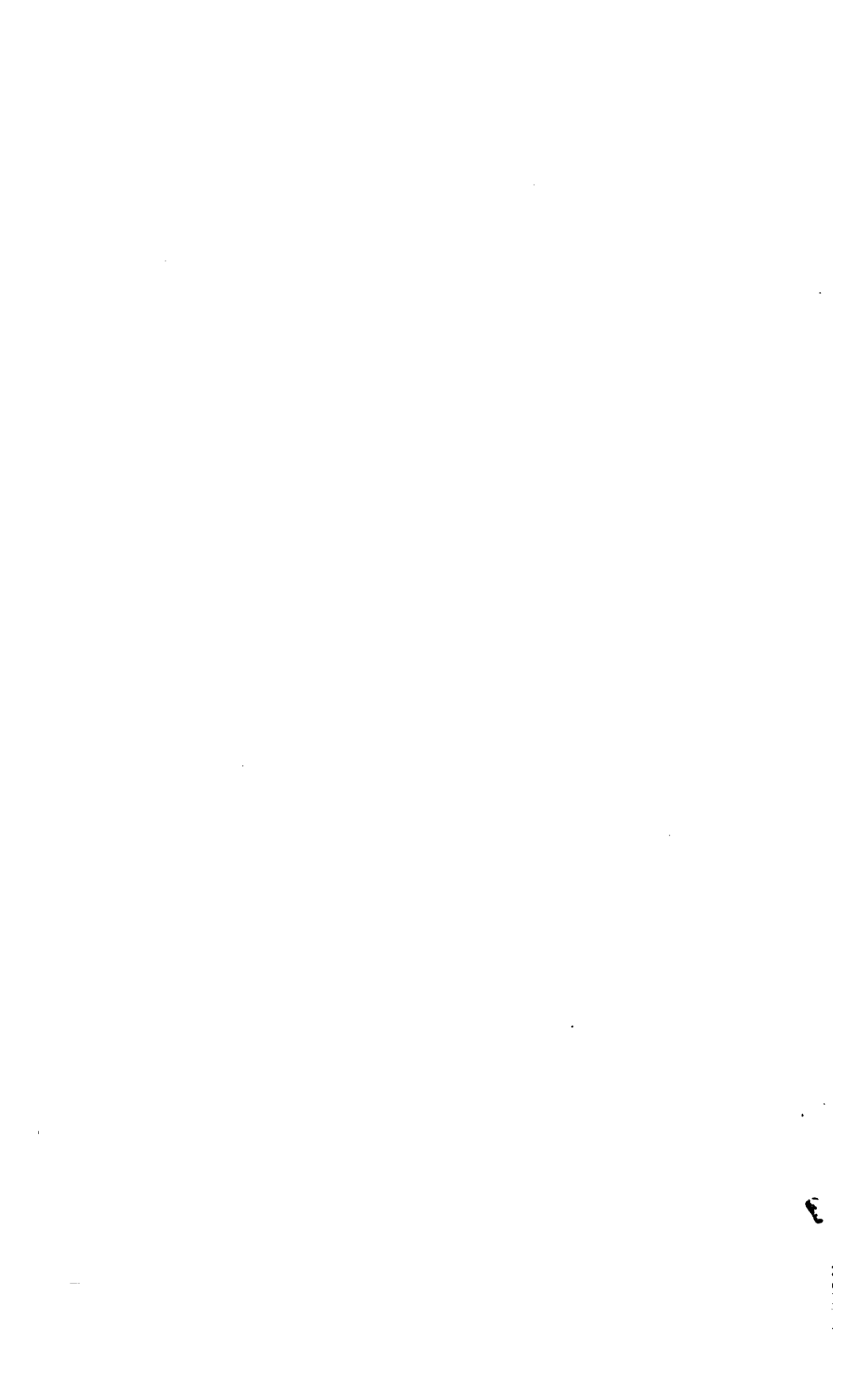
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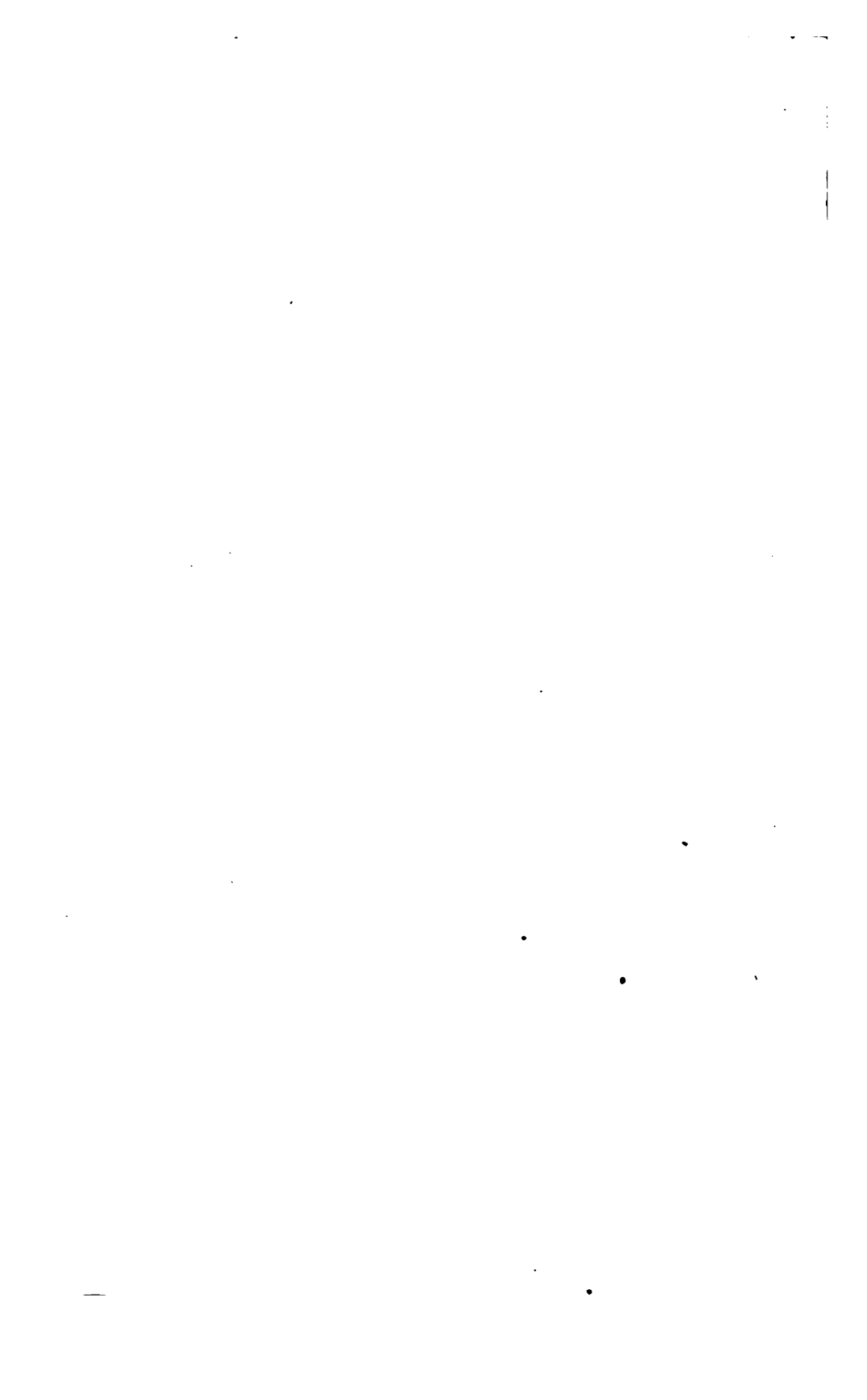
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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 107,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK. *†
HON. BYRON K. ELLIOTT. †
HON. ALLEN ZOLLARS. †
HON. JOSEPH A. S. MITCHELL. §
HON. WILLIAM E. NIBLACK. †

*Chief Justice at the May Term, 1886.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

§Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1886, IN THE SEVENTIETH
YEAR OF THE STATE.

No. 12,547.

**RAUSCH v. THE TRUSTEES OF THE UNITED BRETHREN IN
CHRIST CHURCH.**

QUIETING TITLE.—Adverse Claim.—Sufficiency of Complaint.—Under section 1070, R. S. 1881, the allegation in a complaint to quiet title to real estate, that the defendant's claim of title is adverse to the plaintiff, is sufficient without averring that it is untrue, injurious or wrongful.

SAME.—Cross Complaint.—A cross complaint to quiet title, alleging that the cross complainant is the owner of the property in controversy, and that the plaintiff's claim thereto is a cloud upon his title, is good.

SAME.—Street Improvement Lien.—Sale.—Merger.—Where, in a suit to quiet title, the defendant files a cross complaint, setting up a sale to him of the property by the proper officer in satisfaction of an assessment in his favor for a street improvement, and seeking to hold a lien upon the property, but not alleging that the proceedings were not effectual to convey title, or that the plaintiff claimed any interest in the property, does not state a cause of action.

SAME.—Church Property.—Liability for Street Improvement.—Church property is subject to assessment for the improvement of a street on which it is situate.

107	1
124	472
107	1
139	85
107	1
163	442
107	1
163	126
163	545
107	1
160	474

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SAME.—Deed.—Exhibit.—A deed under which one claims to be the owner of property is merely evidence of title, and not a proper exhibit to a complaint to quiet title.

From the Huntington Circuit Court.

B. F. Ibach and J. G. Ibach, for appellant.

J. T. Alexander and J. M. Hatfield, for appellee.

Howk, C. J.—This was a suit by appellee to quiet its title to lot No. 17, in the original plat of the town, now city of Huntington, against appellant's adverse claim of title to such lot. Appellant answered by a general denial of the complaint, and also filed his cross complaint, in two paragraphs. To each of these paragraphs appellee's demurrer, for the alleged insufficiency of the facts therein, was sustained by the court. Thereupon, appellant withdrew his answer in denial of appellee's complaint, and, refusing to plead further, the court rendered a decree quieting appellee's title to the lot in controversy as against appellant's adverse claim of title thereto.

Appellant has here assigned as errors, (1) the sustaining of the demurrer to the first paragraph of his cross complaint, (2) the sustaining of the demurrer to the second paragraph of his cross complaint, and (3) that appellee's complaint does not state facts sufficient to constitute a cause of action.

1. In the natural order, the last of these errors, which questions the sufficiency of appellee's complaint, should be first considered. It is claimed by appellant's counsel that it is not sufficient for the plaintiff to allege, in a complaint under our statute to quiet his title to real property, that the defendant's claim of title to such property is adverse to him, "unless accompanied by an allegation that such claim is untrue, or injurious to plaintiff, or wrongful." This objection of counsel to the sufficiency of appellee's complaint is not sustained by our statute (section 1070, R. S. 1881), under which it is clear that the plaintiff need only allege in his com-

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plaint, as the appellee has alleged in this case, that the defendant's claim of title to or interest in the real estate in controversy is "adverse to him." Nor is such objection of counsel to appellee's complaint supported by our decisions. In the recent case of *Johnson v. Taylor*, 106 Ind. 89, which was a statutory suit to quiet the title to real property, the court said: "The provisions of section 1070, *supra*, have always been liberally construed by this court. Of course, in such an action, the plaintiff or cross complainant must allege in his complaint or cross complaint that he is the owner of certain real estate, or of a certain interest therein, describing the same; and that the claim of the defendant to his action or cross action, in or to such real estate or interest therein, is adverse to the title asserted by the plaintiff, or is unfounded and a cloud upon plaintiff's title." When the complaint or cross complaint, in such an action, substantially alleges such facts as those stated, as does the appellee's complaint in the case in hand, it would be good on a demurrer thereto for the want of sufficient facts, and good beyond all room for doubt when questioned for the first time by an assignment of error in this court. This is settled, we think, by our decisions. *Marot v. Germania, etc., Ass'n*, 54 Ind. 37; *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383; *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457; *Conger v. Miller*, 104 Ind. 592.

What we have said, in considering the question of the sufficiency of appellee's complaint herein, is practically decisive of the question of the sufficiency of the first paragraph of appellant's cross complaint, in his favor. In that paragraph of his cross complaint, appellant alleged that he was the owner of the lot in controversy, and that appellee's claim to such lot was a cloud upon his title, and he asked that the title be decreed to be in him, and for such other relief as law and equity entitled him to. The facts stated in this paragraph, we think, constituted it a good cross complaint under our statute to quiet appellant's title to the lot in controversy, sufficient to withstand appellee's demurrer

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thereto. It is true that appellant attempted to make the deed, under which he claimed to be the owner of the lot in controversy, a part of the first paragraph of his cross complaint by filing therewith, as an exhibit, a copy of such deed. But it is evident that such deed was at most evidence merely of appellant's title to such lot, and was not, in any proper sense, the foundation of the cause of action stated in such first paragraph of his cross complaint. It is only where the pleading is founded on a written instrument, that the instrument can be made a part of the pleading by filing therewith "the original, or a copy thereof." Section 362, R. S. 1881; *Anderson School Tp. v. Thompson*, 92 Ind. 556; *Hight v. Taylor*, 97 Ind. 392. But without reference to the copy of such deed, and rejecting it as mere surplusage, we think the facts stated in the first paragraph of appellant's cross complaint were sufficient to constitute a cause of action in his favor; and, therefore, that the court clearly erred in sustaining appellee's demurrer to such first paragraph.

The error assigned by appellant, upon the sustaining of appellee's demurrer to the second paragraph of his cross complaint, presents questions very different from those we have hitherto considered in this opinion. Appellant claimed to be the owner of the lot in controversy, under a sale thereof by the treasurer of the city of Huntington upon a precept issued to him by the city clerk, pursuant to an order of the common council of such city, for the collection of certain assessments against such lot for the improvement of the city street, whereon the lot fronted, by the appellant as contractor with the city for the improvement of such street, at which sale he became the purchaser of such lot, and under a deed of the lot, subsequently executed to him as such purchaser, by the city treasurer in pursuance of such sale. In the second paragraph of his cross complaint appellant did not allege, *in hæc verba*, that he was the owner of the lot described in appellee's complaint; but he alleged therein that the appellee was the owner of such lot on September 3d, 1879, and

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was then and had since continued in the possession thereof; that on the day last named the common council of such city of Huntington, then and there composed of six members and no more, adopted an ordinance to grade and macadamize Poplar street, and boulder the gutters on each side thereof through its entire length, from Market street north to German street, at the cost and expense of the owners of the lots bordering on Poplar street; that the lot in controversy herein bordered on such street for 135 feet; that such ordinance was adopted by the votes of all the members of such common council, in favor of its adoption; that thereupon, by order of the common council, the city civil engineer gave notice by publication in a weekly newspaper for two consecutive weeks, that sealed proposals would be received by such common council, at the city clerk's office, until October 1st, 1879, for macadamizing and gravelling Poplar street, and for bouldering the gutters on each side thereof, the bids for such macadamizing, and the bids for bouldering the gutters, to be made separately, and that joint bids would not be entertained; that in the notice so published each lot and parcel of land, bordering on Poplar street, was particularly described and the names of the respective owners thereof were given, and they were therein notified that the improvement of such street, in the manner specified, would be done at the cost and expense of the owners of the property abutting thereon, and the street and alley crossings only would be paid by such city; and that the lot in controversy was described, and the appellee as owner and occupant thereof, and the then trustees of such church were named in the aforesaid notice.

And appellant further alleged that, pursuant to such notice, on October 1st, 1879, the common council of such city in regular session, with all the members present, opened all the bids received for the improvement of such street, and appellant was found to have been the best bidder for bouldering the gutters of such street; that thereupon, on October 16th, 1879, such city entered into a written contract with appel-

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lant for the bouldering of such gutters for 33 cents per lineal foot, in accordance with his bid; that, in pursuance of such contract, appellant entered upon and performed his work, according to such ordinance and in compliance with his contract; and that, from the commencement until the completion of his work, and during all such time, the appellee, by its trustees, stood by and saw the same done, well knowing that it was being done by appellant under a written contract with such city, and that the owner of the lot in controversy would be liable to appellant for the proportion of the costs of such improvement, in the ratio of the front line of the lot owned by appellee to the whole improved line; and that at no time did the appellee or any of its trustees make any objection to appellant against the construction of such improvement under his aforesaid contract.

Appellant has then alleged at great length, in this second paragraph of his cross complaint, his completion of the improvement of Poplar street, according to his contract and within the time stipulated therein, the subsequent order of the common council, of about the 1st day of April, 1880, directing the city civil engineer to give appellant an estimate of the whole cost of such improvement, with an assessment against each lot and parcel of land fronting on such street, of its proportionate part of such whole cost, the amount assessed against appellee's lot, to wit, \$88.69, the appellant's demand of such sum and appellee's failure and refusal to pay it, appellant's affidavit and application to the common council for a precept, the granting and issue of the precept to the city treasurer, the treasurer's advertisement and sale of the lot to appellant for \$102.97, and the subsequent execution by the city treasurer of a deed of such lot to the appellant, which deed is set out as a part of such second paragraph of cross complaint.

The prayer for relief in this paragraph is, "that the title in said realty be not quieted in said plaintiff, but that this defendant have and hold his lien upon said realty, for the said

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improvement made thereon, in the sum of \$102.97, with fifty per cent. damages, or for such sum as the court may find to be a proper lien and charge against such real estate, and that the court appoint a receiver to take charge of such real estate, and apply the rents and profits to the payment of such lien and costs of this suit, and give such other and further relief as law and equity demand."

If the facts stated in this paragraph of cross complaint had been pleaded as an answer, it is possible that they would have constituted a good defence in bar of appellee's suit; but we decide nothing on this point, as the question is not before us. We may properly remark, however, in this connection, that church property is subject to assessment for the improvement of a street whereon it may be situate; and that what was said to the contrary in *Lowe v. Board, etc.*, 94 Ind. 553, was said inadvertently, and is not sustained by the case there cited of *First Presbyterian Church v. City of Fort Wayne*, 36 Ind. 338 (10 Am. R. 35).

It is settled by our decisions that a single pleading can not be made to perform the two-fold function of an answer in bar and a counter-claim or cross complaint, asserting a cause of action. *Campbell v. Routt*, 42 Ind. 410; *Thompson v. Toohey*, 71 Ind. 296; *Anderson, etc., Ass'n v. Thompson*, 88 Ind. 405; *Conger v. Miller, supra*. The paragraph under consideration was regarded below, by court and counsel, as a cross complaint, and it must be so considered here. As a cross complaint we think the facts stated therein were clearly insufficient to constitute a cause of action in favor of appellant, or to entitle him to the relief prayed for, or to any other equitable relief. It is certain that after he withdrew his answer in denial of appellee's complaint, thus leaving such complaint to be taken *pro confesso* for the want of an answer, he was in no condition to ask, as he did in his cross complaint, that the title to the lot in controversy should not be quieted in appellee. If the facts stated in appellee's complaint were true, and they were not controverted after the withdrawal of

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appellant's answer, and, therefore, as provided in section 383, R. S. 1881, they "shall, for the purpose of the action, be taken as true," the appellee was clearly entitled to the decree prayed for in such complaint, quieting and determining its title to the lot in controversy against the appellant.

If the facts stated by appellant in his cross complaint are true, and he can not complain, we think, if we take them as true, and if all the proceedings, which were connected with and precedent to the sale and conveyance to him of the lot in controversy were regular, legal and valid, then he did not have or hold any lien upon such realty for such street improvement in any sum whatever. For, in such case, his alleged lien was extinguished by or merged in such sale and conveyance to him of the lot in controversy, for the sum claimed to be due him for the improvement of such lot and street. It was not alleged by appellant that any of the proceedings for the improvement of Poplar street were defective or illegal, in any particular, either before or after he was allowed an estimate and assessment for the amount of work done by him under his contract with the city. We have nowhere found in the second paragraph of his cross complaint any facts stated which would seem to justify or authorize his appeal to a court of equity, or which constitute any sufficient ground for equitable relief. In this paragraph he has not alleged any facts sufficient to show that he has any cause or right of action, either at law or in equity, against the appellee in relation to the lot in controversy. He has not alleged therein that after the sale and conveyance of the lot to him by the city treasurer, the appellee or its trustees had ever claimed any title to or interest in such lot, adversely to him or otherwise. Under our code, the rule of pleading is well established, which requires each paragraph of complaint or cross complaint, when questioned by demurrer, to be good within and of itself, without aid from any other pleading in the cause. *Conger v. Miller, supra.*

The Western Union Telegraph Company v. Locke, Administrator.

The demurrer to the second paragraph of cross complaint was correctly sustained.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the first paragraph of cross complaint, and for further proceedings.

Filed June 18, 1886.

No. 12,941.

**THE WESTERN UNION TELEGRAPH COMPANY v. LOCKE,
ADMINISTRATOR.**

APPEAL.—*Will not Lie from Order Requiring Production of Document.*—An appeal will not lie from an order requiring a party to produce a document for inspection, or to be used as evidence. Section 646, R. S. 1881, does not apply.

From the Huntington Circuit Court.

C. B. Stuart and *W. V. Stuart*, for appellant.

H. J. Shirk, J. Mitchell, J. L. Farrar and *J. Farrar*, for appellee.

ELLIOTT, J.—The appellant prosecutes this appeal from an order directing it to produce a written instrument, and the appellee denies that an appeal will lie. The question, therefore, is, will an appeal lie from an order requiring a party to produce a document?

It is declared by the very great weight of authority, that an appeal will lie only from final judgments, unless the statute otherwise expressly provides. Mr. Powell says: "The rule that an appeal only lies upon a final decree, judgment or order, seems to prevail throughout the States; and that it can not be taken upon an interlocutory order unless expressly allowed by statute. A judicial decision is essential as the foundation of an appeal." Powell App. Proceed. 367.

107	9
136	368
107	9
130	546
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137	259

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153	369

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155	38

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Freeman says: "The policy of the laws of the several States and of the United States, is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that cases should not be prematurely brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment, interlocutory in its nature, were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor." Freeman Judg., section 33. Another author says: "To authorize an appeal, there must be a judgment," and adds: "In addition to this requisite, appeal, like a writ of error, is generally confined to a final judgment. It can not be taken, unless expressly authorized by statute, from a judgment merely interlocutory or provisional." Hilliard New Trials (2d ed.), 712.

We do not think it necessary to refer to the numerous cases cited by these authors, for there is no diversity of opinion, and our own cases have recognized as correct the rule stated by them. *Miller v. State*, 8 Ind. 325; *Reese v. State*, 8 Ind. 416; *Reese v. Beek*, 9 Ind. 238; *Hamrick v. Danville, etc.*, *G. R. Co.*, 30 Ind. 147; *State v. Ely*, 11 Ind. 313; *Northcutt v. Buckles*, 60 Ind. 577.

It is indeed settled that the general rule is, that parties can not by agreement take a case by appeal to the Supreme Court, unless there is a final judgment. *Shroyer v. Lawrence*, 9 Ind. 322; *Wingo v. State*, 99 Ind. 343. We affirm, therefore, that the general rule is that appeals will lie only from final judgments.

The order directing the production of the contract between the appellant and the railroad company is an order made in the progress of the cause and is not a final judgment. If it should be conceded that such an order is final, then it must

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be so held in every case where a written instrument is ordered to be produced, whether it be a promissory note, a receipt, a deed, a lease or any other written instrument, and such a holding would enable litigants to vex their adversaries in the simplest cases by groundless and expensive delays. The spirit of our cases and the principles of our law are against the practice here contended for by the appellant, and upon a careful search we have found no case recognizing such an order as that appealed from as a final judgment. It is not a final judgment within any definition that we have seen. A final judgment was thus described in one of our own cases: "A final judgment is the ultimate determination of the court upon the whole matter in controversy in the action. An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy, is an interlocutory order, and is sometimes called an interlocutory judgment." *Pfeiffer v. Crane*, 89 Ind. 485. Mr. Freeman says: "The general rule recognized by the courts of the United States, and by the courts of most, if not of all the states, is that no judgment or decree will be regarded as final within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it." Freeman Judg., section 34. At another place this author says: "So far as any general distinguishing test can be gathered from the numerous decisions, it is this: That, if after a decree has been entered, no further questions can come before the court, except such as are necessary to be determined in carrying the decree into effect, the decree is final; otherwise it is interlocutory." Freeman Judg., section 36.

It is said by another author, citing many cases, that "The idea of an appeal is, that it is for the purpose of a rehearing of the whole case upon its merits." Powell Appellate Proceedings, 369. We are referred to several cases decided by the Supreme Court of New York, but we find on examination

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that they are founded on a statute of a peculiar character, and that there is a direct conflict in the decisions of that court, so that the decisions referred to can not be regarded as authority elsewhere than in New York, even if they can be so regarded in that jurisdiction. Wait Annotated Code, 685, 688.

The case of *Cummer v. Kent Judge*, 38 Mich. 351, was an application for a mandate to compel a judge to vacate an order of discovery, and in two essential respects it differs from the present: 1st. It was not an attack upon an interlocutory order made upon a party to produce instruments of evidence. 2d. The opinion proceeds upon the theory that the trial court had no jurisdiction to make the order, for it is said in the conclusion of the opinion that "The order was not a legitimate exercise of jurisdiction." Whatever may be thought of the correctness of the decision, it is evident that it is not of controlling authority in our State where there is a statute expressly authorizing the court to make an order to produce papers and documents. R. S. 1881, sections 479, 480. It is to be kept in mind that in this instance the court had jurisdiction of the subject-matter and of the person, and although it may have erred the error can only be corrected on an appeal properly taken, so that the question here is not one of jurisdiction. The decision in *Taylor v. Sweet*, 40 Mich. 736, is not in point, for there the judgment fully and finally settled the rights of litigants to a fund claimed by them. We do not regard the decision in *Drury v. Young*, 58 Md. 546, as favorable to the appellant, for the court there said: "It was at the option of the defendants to have refused to produce the paper at the trial and take the risk of a judgment by default, and if the court below should have determined to render one against them, and upon an appeal from such judgment, the question would have been properly before us." To us it seems clear that this language will justly bear but one construction, and that is, that the opinion of the court was that the only way in which the question can come before the appellate court is by appeal after final judgment. It is per-

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haps but just to appellant's counsel to quote their own expression of opinion. After reviewing the authorities, they say: "We confess to some doubts as to this being a final judgment within the meaning of our statute, from which an appeal will lie, and yet if the decision of the Supreme Court of Michigan lays down the correct rule, this order is, it seems to us, for the reasons stated, a final judgment."

The second position occupied by appellant's counsel is thus stated by them: "2d. But, however the court may determine that question, we do submit that the order in the case at bar is an interlocutory order within the meaning of section 646 of the statute." So far as that section is material to the present discussion it reads thus: "Appeals to the Supreme Court may be taken from an interlocutory order of any circuit court or judge thereof, in the following cases: *First*. For the payment of money, to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents, or things in action." R. S. 1881, section 646.

It is quite clear that this provision can not be construed to refer to the production of documents to be used as instruments of evidence, since no delivery in the sense intended by the statute is required by an order directing the production of a document for inspection or for use as evidence upon the trial. The delivery of a document is more than the production of it, for delivery imports a surrender or parting with possession for a permanent purpose. A familiar illustration of the meaning of the word "delivery" is found in the law upon the subject of the execution of deeds, as well as in the law of contracts. Of its meaning in the law of contracts Judge Bouvier gives this definition: "The transfer of the possession of a thing from one person to another." Bouvier Dict., Title Delivery. But the meaning of words is to be determined from those with which they are associated, or, as the maxim is, "*Noscitur a sociis*," and the words with which the word "delivery" is associated very plainly show that it was

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not used as meaning the production of an instrument of evidence for the purposes of the trial.

The statutory provision quoted refers to an order compelling the person against whom it is directed to do an act divesting himself of possession and title, for no other meaning can be justly assigned to the words "execution," "assignment" or "delivery," and these are the words which control the provision. It can not be even plausibly maintained that these words refer to the mere production of documents for inspection, for this would be to wrench them from their well known and long accepted meaning. We can not bring our minds to the conclusion that this statute was intended to give the right of appeal in every case where there is an order for the production of a document for use as evidence on the trial, and unless this right of appeal exists in every case, whether the instrument directed to be produced be a promissory note, a receipt, a lease or a deed, it exists in none. It is easy to see that the administration of justice might be seriously embarrassed and vexatious delays secured, if appeals could be taken in every case where a written instrument is ordered to be produced for use as evidence on the trial of the cause.

It is very ingeniously and ably argued that great hardship might often result from the error of a trial court in directing the production of a document, but there are many cases in which the erroneous ruling of the trial court on a question arising in the course of the proceeding may produce great hardship, yet this consideration supplies no reason for allowing an appeal. The truth is, that in every case much must necessarily be left, in the first instance, to the sound judgment of the trial judge, and although he may err and thus cause serious injury to the party, still no appeal will lie until after the final judgment, for the case can not be cut up into parts and tried by piecemeal. An error in compelling a party to give oral testimony may be as injurious as one made in directing the production of written instruments of evi-

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dence, but certainly in such a case there can be no appeal until after final judgment. So, an error may be committed in compelling the disclosure of confidential communications, or in compelling a party to submit to a personal examination, and yet there can be no appeal from such a ruling. So, also, great hardship may arise from erroneously compelling a party to produce a letter, a receipt, a promissory note, a lease or a deed, but the hardship of the case will not entitle the party to an appeal. On the other hand, to allow appeals from such rulings before final judgment, would be a great hardship to the party rightfully demanding the production of the instrument; it would also be a great injustice to the public and a burden to the courts, for it would enable litigants to take many appeals in a single cause.

It is safer to trust the trial judge than the interested parties. It is consistent with experience and in harmony with sound principle to trust to the judge rather than to the parties having important interests at stake and often angered by controversy. It is far better to presume that the judge will not unjustly require the production of a written document, than to presume that a party will not abuse the right of appeal. It is, therefore, important that the right of appeal from all interlocutory orders should be carefully guarded, and the statutes conferring it strictly construed. On this point the authorities agree.

Appeal dismissed.

Filed June 15, 1886.

No. 12,861.

JOHNSON v. THE BOARD OF COMMISSIONERS OF WELLS
COUNTY ET AL.

CONSTITUTIONAL LAW.—*Retrospective Legislation.—Curative Statutes.*—There is no inhibition in the State Constitution against the passage of retrospective statutes, and such legislation, of a curative character, which is

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132	426
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136	543
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138	689
107	15
142	364
143	315
143	403
107	15
144	323
145	606
107	15
151	155
152	217
153	219
153	226
107	15
155	149
156	701

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168	437
107	15
161	328
107	15
163	20

in accord with justice, equity and sound public policy, and which does not materially interfere with or overthrow vested rights, imposes no new burdens, and does not infringe upon the judicial department of the government, will be upheld.

SAME.—Such statutes will not be sustained where they purport to legalize proceedings had without jurisdiction over the subject-matter or the person, and where there was an entire lack of power on the part of the court, body, or officer, whose proceedings are sought to be legalized.

SAME.—*Legislative Discretion.*—*General Rule.*—Where the thing omitted or irregularly done in the proceedings sought to be legalized by a curative statute, is something, the necessity for which the Legislature might have dispensed with or made immaterial by a prior statute, it is competent to dispense with it or declare it immaterial by subsequent legislation.

SAME.—*Special Legislation.*—Except where the case falls within the cases enumerated in section 23, article 4, of the Constitution, the Legislature is the sole judge as to whether or not a general law can be made applicable, and when in such cases the legislative judgment is expressed that special legislation is required, and a special curative or retrospective statute is, under such circumstances, enacted, it will be upheld.

SAME.—An act of the Legislature, legalizing the action of a board of commissioners in the establishment of a free gravel road, is in no sense a special law "for laying out, opening, and working on, highways," within the meaning of section 22, article 4, of the Constitution.

SAME.—In an action by F. to enjoin the collection of an assessment made in a proceeding for the establishment of a free gravel road, the Supreme Court held that the action of the board of commissioners in such establishment and all subsequent proceedings in the matter were void. Subsequently, a valid curative statute was enacted, legalizing all such proceedings of the board, and all assessments made under the same. After the taking effect of this statute, J., who was not a party to F.'s action, attempted by injunction to escape the payment of assessments made against his land in such proceeding.

Held, that J. is bound by the law as it stood when he commenced his action, and that he is not entitled to the relief prayed.

SAME.—*Legalizing Act of April 11th, 1885, Constitutional.*—The act of April 11th, 1885, legalizing the action of the board of commissioners of Wells county, in relation to the construction of the Bluffton and Rockford gravel road, etc. (Acts 1885, p. 178), is constitutional and valid.

From the Wells Circuit Court.

N. Burwell, for appellant.

J. S. Dailey, L. Mock, A. Simmons, J. J. Todd and E. R. Wilson, for appellees.

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ZOLLARS, J.—The board of commissioners of Wells county were in session on the first Monday after the second Tuesday in October, 1881, for the purpose of receiving reports from school trustees, as provided by section 4441, R. S. 1881, and for no other purpose. They adjourned from day to day until the subsequent Thursday, being the 20th day of October, 1881. On that day a petition was presented to the board, signed by the requisite number of proper persons, as required by section 5092, R. S. 1881, asking for the construction of a free gravel road, known as the Bluffton and Rockford Gravel Road. A proper bond was also filed with the petition. The board appointed the requisite number of viewers and an engineer, and fixed the 21st day of November, 1881, as the day upon which they should examine, view, and lay out the road. After this action by the board, the proceedings were all regular to the final construction and completion of the road, and the issue and negotiation of the bonds, as required by the act. Appellant's lands were assessed \$348, to be paid in five years, in equal semi-annual instalments. The amount charged against his lands for the years 1882 and 1883 he has paid.

All proceedings by the county board subsequent to the 20th day of October, 1881, as above stated, were had and taken at regular sessions of that body, as fixed by law.

The only infirmity in the proceedings is the initial steps taken on the 20th day of October, 1881. On that day the board was not sitting in regular or special session for the transaction of general business, but only, as above stated, for the one purpose of receiving reports from school trustees.

This proceeding was before this court in the case of *Fahlor v. Board, etc.*, 101 Ind. 167, and it was there held that a complaint by Fahlor to enjoin the collection of an assessment against his land was good, because it showed that the proceedings and orders of the county board had and made on the 20th day of October, 1881, were a nullity, the board not being in regular or special session, for the transaction of such

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business. The decision in that case was made on the 13th day of March, 1885.

Upon the authority of that case, and the averments in the complaint in the case before us, we assume that the proceedings of the county board, on the 20th day of October, 1881, were irregular, and for that reason a nullity, as well as all of the subsequent proceedings resting thereon.

On the 11th day of April, 1885, an act was passed, with an emergency section, the purpose of which was to legalize the proceedings of the county board in relation to the gravel road. There is a lengthy preamble, reciting the facts, followed by the following: "Therefore, section 1. *Be it enacted* * * * That all the sessions of the board of commissioners of Wells county, in the State of Indiana, and all the acts of said board in relation to the Bluffton and Rockford Gravel Road, * * are hereby legalized and declared valid; that all the assessments and charges made for the construction of said Bluffton and Rockford Gravel Road, * * and all the bonds issued or sold in aid thereof, and all contracts, assessments and levies made in relation thereto, are hereby legalized and declared valid." Acts 1885, p. 178.

By this action, commenced on the 1st day of May, 1885, appellant seeks a perpetual injunction against the collection of the unpaid assessment against his land.

The above act, if it is constitutional, is broad enough in its terms to cover and legalize all of the proceedings by the county board in connection with the gravel road. We are met, *in limine*, with the important question, is the act constitutional?

That question involves the following inquiries:

1st. Is the act unconstitutional, because retrospective in terms and effect?

2d. Is it unconstitutional, as being in conflict with section 23, of article 4, of the Constitution, which declares that in all cases enumerated in section 22 of that article, and in all other cases where a general law can be made applicable, all laws

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shall be general, and of uniform operation throughout the State?

3d. Is the act unconstitutional, as being in conflict with section 22, of article 4, of the Constitution, which declares that the General Assembly shall not pass local or special laws in certain enumerated cases, among which is, "For laying out, opening, and working on, highways," etc.?

4th. Is the act unconstitutional, as being an infringement upon the judicial department of the State government by the legislative department? In other words, did the Legislature, in the passage of the act, assume and exercise judicial functions?

Of these in their order:

1st. There is no inhibition in the Constitution against the passage of retrospective statutes. That such statutes may be passed by the Legislature, in the absence of a constitutional inhibition, is well settled.

And especially is this so, if the effect of the statute is in accord with justice, equity and sound public policy. And hence such statutes have been sustained, where their effect was to render valid contracts which, but for them, would have been void. *Andrews v. Russell*, 7 Blackf. 474; *Reed v. Coale*, 4 Ind. 283; *Wood v. Kennedy*, 19 Ind. 68; *Price v. Huey*, 22 Ind. 18; *Sparks v. Clapper*, 30 Ind. 204; *Perrin v. Lyman*, 32 Ind. 16; see, also, *Henderson v. State, ex rel.*, 58 Ind. 244; *Pritchard v. Spencer*, 2 Ind. 486; *Flinn v. Parsons*, 60 Ind. 573.

It must be regarded as settled also, that curative or retrospective legislation will not be upheld if it materially interferes with or overthrows vested rights, creates and imposes new burdens, or infringes upon the judicial department of the government. The general and better rule is, that curative statutes will not be sustained as legalizing proceedings had without jurisdiction over the subject-matter, or the person, and where there was an entire lack of power on the part of the court, body or officer, whose proceedings are sought

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to be legalized. *Strosser v. City of Fort Wayne*, 100 Ind. 443, and the cases there cited; see, also, *Welty Law of Assess.*, pp. 381, 386; *Lewis v. Brackenridge*, 1 Blackf. 220; *Bryson v. McCreary*, 102 Ind. 1. Some of our cases, however, at first blush, seem to carry the rule further.

It is settled by our decisions, and the authorities elsewhere, that curative or retrospective statutes may cure defects and irregularities in proceedings, even though the defects and irregularities are so flagrant as to render the proceedings, for all practical and enforceable purposes, null and void.

During the late War, the boards of commissioners of many of the counties in this State made appropriations in different forms in the way of bounties to volunteers. At the time those appropriations were made, they were without authority, for the reason that while there was a law authorizing county boards to appropriate money to take care of soldiers' families, and to arm and equip military companies for home defence, there was no law authorizing such appropriations in the way of bounties to volunteers in the service of the armies of the United States.

On the 3d day of March, 1865, an act was passed legalizing all bonds or orders theretofore issued, or appropriations made by and under the authority of the boards of commissioners of the several counties, for the purpose of procuring or furnishing volunteers for the armies of the United States, etc. In a number of cases that came before this court, it was held, that at the time the appropriations were made, they were unauthorized by law, but were validated by the curative act of 1865, which was a constitutional and valid statute. *Coffman v. Keightley*, 24 Ind. 509; *Board, etc., v. Bearss*, 25 Ind. 110; *King v. Course*, 25 Ind. 202; *Nave v. King*, 27 Ind. 356; *Miller v. Board, etc.*, 29 Ind. 75; *Board, etc., v. Onstott*, 29 Ind. 384; *State, ex rel., v. Buckles*, 39 Ind. 272; *Sithin v. Board, etc.*, 66 Ind. 109.

In the case last above, in speaking of the curative act of

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March 3d, 1865, and the fact that the appropriation was made at a time when the county board was not legally in session, it was said: "The act has thus been held valid as legalizing the orders of boards, which they had no power, even when in regular session, to make. And if the statute thus supplies the want of power and makes valid such orders made without power, much more should it supply any defect as to the regularity or legality of the sessions of the boards, when such orders were made. * * * There can be no doubt of the power of the Legislature to cure, by subsequent act, any defect growing out of the fact that the orders of the board were made at a time when it was not in legal session." As in line with the rulings in the above cases, see *Halstead v. Board, etc.*, 56 Ind. 363.

It was held in at least two cases, that until the election of trustees of towns was certified as required by statute, their actions were void. *Dinwiddie v. President, etc.*, 37 Ind. 66; *Pratt v. Luther*, 45 Ind. 250.

In 1875 a retrospective statute was passed, validating all actions of such trustees before their elections were so certified. This act was held constitutional and valid.

In the case of *Gardner v. Haney*, 86 Ind. 17, it was said: "Before the enactment of this legalizing and curative statute, this court held, with much apparent reluctance, that the acts and ordinances of a board of town trustees, before the proper certified statement of their election had been made out and filed, were invalid and void. *Dinwiddie v. President, etc.*, 37 Ind. 66; *Pratt v. Luther*, 45 Ind. 250. But it was competent for the General Assembly, as the supreme and sovereign power of the State, to legalize and validate the acts and ordinances of the trustees *de facto* of the town of Monticello, and this was done, we think, by the aforesaid act of March 13th, 1875."

Under our general statutes, it is necessary that judgments shall be entered up and signed by the judge, in order that a valid execution may be issued thereon. *Galbraith v. Sidener*,

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28 Ind. 142; *Passwater v. Edwards*, 44 Ind. 343. In such case, however, the judgment is not absolutely void, but simply not enforceable by execution. *Kent v. Fullenlove*, 38 Ind. 522.

There is a line of cases holding that such signature by the judge may be dispensed with, and the judgment, execution and all proceedings thereunder validated, by a curative or retrospective statute. *Cookerly v. Duncan*, 87 Ind. 332. And so it was held, that no valid judgment could be rendered against a party without summons, and with no other appearance than a waiver and an appearance written upon the complaint. *McCormack v. First Nat'l Bank*, 53 Ind. 466.

Subsequently, a retrospective statute was passed validating all judgments and proceedings under them, rendered upon such an appearance. That statute was held to be constitutional and valid. *Muncie Nat'l Bank v. Miller*, 91 Ind. 441; *Vanslyke v. Shryer*, 98 Ind. 126.

It has been held, also, that judgments rendered at a special term of court, not held pursuant to law, may be validated by a retrospective statute. *Walpole v. Elliott*, 18 Ind. 258. In that case it was said: "The Supreme Court of this State decided, in the following cases, that it was competent for the Legislature, by a curative statute, where not restrained by a constitutional provision, to make a void thing valid. * * * Curative statutes are but a species of retrospective legislation; and retrospective legislation is valid where not forbidden by the Constitution." That case, in its general scope, has been cited and approved as late, at least, as the case of *Kelly v. State, ex rel.*, 92 Ind. 236, in three of the cases above cited. *Sithin v. Board, etc.*; *Gardner v. Haney*; *Muncie Nat'l Bank v. Miller*.

The court quoted with approval the rule laid down by Judge Cooley, which seems to be correct as a general rule applicable in all cases of retrospective legislation, as follows: "The rule applicable to cases of this description is substantially as follows: If the thing wanting, or which failed to

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be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley Const. Lim. 371.

In the case of *Muncie Nat'l Bank v. Miller, supra*, it was said: "It was competent for the General Assembly to have provided by law, before the rendition of the judgment complained of by the appellee, that a written waiver by the defendant of the issue and service of a summons, and of his appearance in or to the action, endorsed on the complaint, should be equivalent to the issue and service of a summons on the defendant in the action. This being so, it was equally competent for the Legislature to provide by law, after the rendition of the judgment, that any judgment rendered in good faith upon such written waiver by the defendant of the issue and service of a summons on him in the action, 'shall be deemed legal and valid in all respects, the same as if a summons had been duly issued and served.'"

Applying the above rulings, and the rule upon which they rest, to the case before us, it may well be said that as the Legislature might, in the first instance, have provided by general law for the location and opening of free gravel roads by the county boards at any session, so it can, by subsequent curative or retrospective general law legalize and validate all such proceedings taken and had at any session of such boards. The curative act of 1885, therefore, is not objectionable on the ground that it is retrospective.

The general law authorized county boards to lay out, open and construct free gravel roads. In the case before us, the board of commissioners of Wells county attempted to proceed under that law, but made the mistake of taking the

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initial steps, not at a regular session, but at a session when the board was not authorized to do such business. There was not a want of power, or jurisdiction over the subject-matter, because the board had general authority to lay out and construct free gravel roads. There was a defect and irregularity in the procedure, and that defect and irregularity were such as might be cured by a legalizing statute, and such as were cured by the legalizing act of 1885, unless that act is invalid upon other grounds than simply being retrospective.

2d. The curative statutes involved in the above cited cases, were all general in their terms. The act of 1885, involved here, is special in its terms. Is it for that reason unconstitutional and void? As we have seen, section 23, of article 4, of the constitution, declares that in all cases enumerated in section 22 of that article, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State. Section 23 recognizes the fact that there may be cases where general laws would be unnecessary and inapplicable, and impliedly authorizes the passage of special laws to meet such cases. And hence many special and local laws have been upheld, and the rulings have been, that where the case does not fall within the cases enumerated in section 22, it is for the Legislature to determine whether or not a general law can be made applicable, and that the legislative judgment upon that question will not be reviewed by the courts. *Gentile v. State*, 29 Ind. 409; *Longworth v. Common Council, etc.*, 32 Ind. 322; *State, ex rel., v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Cash v. Auditor, etc.*, 7 Ind. 227; *Clem v. State*, 33 Ind. 418; *Stocking v. State*, 7 Ind. 326; *Eitel v. State*, 33 Ind. 201.

For the same reason that, in some cases, special statutes may be enacted in the first instance, special retrospective statutes may be enacted. And as, in some cases, the Legislature is the sole judge as to whether or not a general law can be made applicable in the first instance, so, in such cases, it

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is the sole judge as to whether or not a general retrospective statute can be made applicable. And hence special curative or retrospective legislation has been upheld by this court. *Millikin v. Town of Bloomington*, 49 Ind. 62.

The case of *Marks v. Trustees of Purdue University*, 37 Ind. 155, involved a donation made by the county board for the purpose of securing the location of the university in that county. WORDEN, C. J., delivering the opinion of the court, said: "No statute has been cited, and we are not aware of the existence of any, in force at the time, that authorized the making of the order (by the board). It follows that the order was made without legislative authority. Still it was not void in that absolute sense that made it incapable of ratification. If a party, without authority, but professing to act as the agent of another, does an act in the name of his supposed principal, the act is not absolutely void, but may be ratified by the supposed principal, and when so ratified it is as valid as if the pretended agent had had full authority when the act was done. That an order of the board of commissioners, made without authority of law, may be ratified and rendered valid and effectual, is established by the numerous cases in this court upholding the act of March 3d, 1865, 3 Ind. Stat. 565, legalizing bonds, orders, and appropriations made for the purpose of procuring or furnishing volunteers."

After holding that the special act of the Legislature accepting the donation operated as a ratification of the action of the county board, it was further held that the acceptance was properly made by special act, and that it was for the Legislature to judge whether or not a general act could be made applicable.

The case of *Kelly v. State, ex rel., supra*, involved the validity of a special curative statute, legalizing certain acts of the board of commissioners of Clinton county in the purchase of certain grounds at sheriff's sale, etc. In the decision of the case it is said, that, conceding, without deciding, that the purchase, etc., by the county board was unauthorized by law,

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and technically void, it was competent for the General Assembly to legalize and validate all such acts, and that that was done by the special curative statute. It was held that the statute did not fall within any of the cases enumerated in section 22, of article 4, of the Constitution, and that, therefore, it was for the Legislature to determine as to whether a general law could be made applicable. See, also, *Mount v. State, ex rel.*, 90 Ind. 29 (46 Am. R. 192); *State, ex rel., v. Sickler*, 9 Ind. 67.

Upon the authority and reasoning of the above cases, it must be held here that the curative act of 1885 is constitutional and valid, unless it falls within the cases enumerated in section 22, of article 4, of the Constitution.

3d. Section 22, as we have seen, inhibits the passage of local or special laws in certain enumerated cases, among which is, "For laying out, opening, and working on, highways," etc.

At the time the Constitution was adopted there was no law for the laying out and opening of free gravel roads. For the purposes of this decision, however, we assume that the laying out and opening of a free gravel road, is the laying out and opening of a highway, and that hence a local or special statute for the laying out and opening of such a road would fall within the constitutional inhibition.

This brings us to the question, is the curative act of 1885 in any just sense a local or special act for the laying out and opening of a highway? After mature deliberation, we think it is not. It does not purport to be such an act. It does not provide, in any way, for the laying out or opening of a road. It was enacted upon the theory that there was a general law for the laying out and opening of such roads, and that the road in question had been laid out and opened under that act, or, at least, that it had been laid out, opened and constructed, and that the county board had attempted to lay out, open and construct it under the general law, and that in so doing there had been an omission and mistake in the proceedings. The act is just what it purports to be, not an act

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for the laying out and opening of a gravel road, but an act "to legalize the records and action of the board of commissioners of Wells county, Indiana, in relation to the construction of the Bluffton and Rockford Gravel Road. * * To legalize the assessments made against certain real estate for the construction thereof. To legalize the bonds issued by said board in aid of the construction of said road, to legalize all acts in relation to said road, and declaring an emergency."

This holding is fully sustained by the case of *State, ex rel., v. Squires*, 26 Iowa, 340. The Constitution of Iowa contains two sections identical with sections 22 and 23, of article 4, of our Constitution.

The above case was an action by the district attorney, by way of *quo warranto*, on behalf of the State, to oust certain persons, claiming to be the officers of a corporation styled "The Independent School District of Epworth," the existence of which the district attorney denied, upon the ground that the district when organized did not contain three hundred inhabitants, and that ten days' notice of its organization had not been given, as required by the general law. The defendants answered, admitting the defects in the organization of the district, and relying upon "an act to legalize the organization of the Independent School District of Epworth." The question was made, and insisted upon by the district attorney, that the curative act was unconstitutional and void, because in conflict with the sections of the Constitution of the State which prohibited the creation of school districts by special acts, and required all laws to be made general, when they can be made applicable. In answer to this contention the court said: "It is claimed by appellant's counsel that under our Constitution (article 3, section 30), which provides that the General Assembly shall not pass local or special laws, etc., it would not be competent for the Legislature to pass a law incorporating the 'independent school district of Epworth.' This proposition can not be successfully controverted. * * In our view, however, the act set up in the defendant's an-

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swer is not, in any just sense, a law creating a corporation, but is, both in law and fact, what its title purports, a curative act legalizing the defective organization of an independent school district." After holding the special act valid, and in speaking of the requirements of the general law for the organization of independent school districts, it was further said: "It was a matter of discretion with the Legislature to require the performance of these precedent conditions; hence, it may waive a failure to perform them. Nor is the power of the Legislature to cure defective or irregular proceedings limited by the fact, that, but for such curative act, the defective proceeding would be wholly invalid or inoperative."

The holding here finds some support also in former cases decided by this court, although the exact question under discussion here seems not to have been made in those cases. Section 22, *supra*, of the Constitution, forbids the passage of local or special laws regulating county and township business. In the case of *Kelly v. State, ex rel.*, 92 Ind. 236, already cited, a special act, legalizing the purchase of grounds by the board of commissioners of Clinton county at sheriff's sale, was held constitutional and valid. See, also, *Mount v. State, ex rel., supra*.

If there had been an entire lack of power on the part of the county board to construct gravel roads, and the curative statute attempted to legalize their acts in constructing the road in question, we should have an entirely different case.

4th. We come now to the question upon which appellant especially relies for a reversal of the judgment. His contention is, that in the case of *Fahlor v. Board, etc., supra*, the whole proceeding was held to be null and void, and that in the subsequent enactment of the curative statute, the Legislature invaded the functions of the judicial department of the State government, and that the act is, therefore, null and void. In support of this contention, he relies upon the case of *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427, and the cases there cited. In that case, a complaint had been

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filed by a taxpayer of the township to enjoin the collection of a tax upon his land, levied for the purpose of making a donation to the railway company.

The complaint was held good, because it showed that the county board was not legally in session, when the petition was filed, and the order for the election made. Subsequent to the overruling of the demurrer, the Legislature passed a special act, with a preamble reciting the facts, legalizing, or attempting to legalize, all the actions of the county board ordering the election, making the donation, and levying the special tax. After the passage of this act, the court below changed its ruling and sustained the demurrer to the complaint. It was held by this court, that in the passage of the act, with its preamble, the Legislature invaded and exercised the functions of the judicial department of the State government, in a pending action, and that, for that reason, the curative statute was unconstitutional and void. There are these differences between that case and the case in hearing: In that case, the objecting and complaining party had a suit pending when the curative statute was passed. In the case before us, appellant did not commence his action until after the passage of the curative statute. In that case, the tax was a general one upon all the property in the township, and when overthrown as to one taxpayer, it might, with some reason be said, that it could not be upheld as to other taxpayers of the township, without imposing unequal taxation. Here, the burden is imposed, not by a levy of a general tax, but by special assessment on account of benefits received. In such cases, it does not necessarily follow that, because an assessment against one land-owner is overthrown, the assessments against other land-owners must go down with it. Without questioning the correctness of the ruling in the case last above cited, it may not be improper to say, in passing, that there is a respectable array of authorities, holding that it is not important that the legislative act, which cures the defects and irregularities, was passed after suit brought in which

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such defects and irregularities became matters of importance; that the bringing of suit vests in a party no right to a particular decision, and that his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. Cooley Const. Lim. 481, and cases there cited; see, also, *Millikin v. Town of Bloomington, supra*; *King v. Course, supra*; *Price v. Huey, supra*; *Walpole v. Elliott, supra*.

In the case of *McDaniel v. Correll*, 19 Ill. 226, cited in the case of *Columbus, etc., R. W. Co. v. Board, etc., supra*, the curative act was held unconstitutional, because it undertook to validate a judicial proceeding which was void for want of jurisdiction over the persons of some of the defendants. That, clearly, is not the case before us.

In the case of *Denny v. Mattoon*, 2 Allen, 361, also cited in the case of *Columbus, etc., R. W. Co. v. Board, etc., supra*, proceedings in insolvency had been enjoined and adjudged to be invalid because had before a person who had no right or title to act as judge. Afterwards, an act was passed by the Legislature which, after reciting the facts, declared that the proceedings in insolvency should be deemed good and valid in law to all intents and purposes whatever. It was held that that act was unconstitutional and void, because it was an attempt to declare good and valid, what the court had declared to be illegal and invalid; that it was, therefore, an unwarranted attempt on the part of the Legislature to exercise judicial functions, and, if upheld, would dissolve a perpetual injunction granted by the court. That case differs very materially from the case before us. There, an adjudication that the proceedings in insolvency were illegal and void, bound not only the assignor and assignee, but all creditors, because they were parties in interest and hence parties in privity. They, and each of them, were as much bound by the adjudication as if they had been parties in name to the action in which the adjudication was made. The curative statute, therefore, would have overthrown the judgment,

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not only as to the parties named in the action, but as to all creditors who were bound by the adjudication.

This court in the case of *Fahlor v. Board, etc., supra*, held that upon the facts stated by Fahlor in his complaint, he was entitled to an injunction, and reversed the judgment because a demurrer to his complaint had been sustained below. Whether or not Fahlor has prosecuted his action to final judgment, and procured an order perpetually enjoining the collection of the assessment against his land, is not shown by the record before us. Assuming that he has, it may well be said that he will not and can not be affected by the curative statute of 1885. It is well settled that the Legislature can not overthrow judgments by legislative mandate, curative statutes or otherwise.

At the time he commenced his action, and at the time his case was passed upon by this court, the assessment against his land could not have been enforced by reason of the infirmities in the proceedings by the county board, as stated in his complaint. Before appellant commenced his action, those infirmities had been healed by the curative act of 1885. Appellant, therefore, is asking that his rights shall be adjudicated, not under the law as it stood when he commenced his action and sought the aid of the courts, but under the law as it stood prior to that time. He seeks protection from the judgment that was, or might have been rendered in favor of Fahlor. He was in no way a party to Fahlor's action, nor was he, as we think, in any way privy thereto. Before the passage of the curative statute of 1885, the proceedings by the county board, by reason of the irregularities already mentioned, were a nullity as to appellant. They were not more so, after the adjudication in the Fahlor case. That Fahlor may escape payment by reason of the ruling and adjudication in his case, will not result in unequal taxation, because the assessments were not imposed as taxes. They were imposed as the equivalent of benefits received from the construction of the gravel road. Neither will the escape of

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Fahlor increase appellant's burdens, nor lessen his benefits. We know of no principle or rule of the law that will extend and apply the ruling in Fahlor's case to the case of appellant, commenced subsequent to the passage of the curative act of 1885.

It results from the above, that the court below should have sustained appellee's demurrer to the complaint. The case is brought here by appellant, upon the ruling of the court below in overruling his demurrer to appellee's answer. We do not extend this opinion to inquire as to whether or not the answer is good, as in any event, it is good enough for a bad complaint. *Ice v. Ball*, 102 Ind. 42.

Judgment affirmed, at appellant's costs.

Filed June 15, 1886.

107	39
136	533
107	32
121	420
107	32
143	636
107	32
150	842

No. 12,620.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. COSBY
ET AL.

HUSBAND AND WIFE.—*Action for Personal Injuries to Wife.*—*Parties.*—*Pleading.*—In an action to recover damages for personal injuries to the wife, the husband is a proper but not a necessary party.

SAME.—While the husband is presumptively entitled to maintain a separate action to recover for medical attendance, loss of service and of the society of the wife, he can not recover for these in an action in which the wife is suing for injuries to her person, nor can such damages be recovered by them jointly.

SAME.—*Measure of Damages.*—In an action by a married woman to recover damages for personal injuries, she is entitled to nothing for medical attendance, or loss of time, unless special circumstances rebutting the presumptive right of the husband to recover therefor, is averred and proved.

SAME.—*Instruction to Jury.*—In such an action, an instruction "that in order to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of," correctly states the law.

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BILL OF EXCEPTIONS.—*Delay of Judge in Signing.*—*Practice.*—If a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed, will not deprive the party of its benefit.

From the Dearborn Circuit Court.

C. A. Beecher, H. D. McMullen and P. Werner, for appellant.

O. F. Roberts, G. M. Roberts and C. W. Stapp, for appellees.

MITCHELL, J.—Lizzie Cosby and her husband joined in a complaint against the Ohio and Mississippi Railway Company, to recover damages for an alleged injury to the wife. The complaint charges that Mrs. Cosby, having taken passage on one of the railway company's trains, arrived at Aurora, her place of destination, and having left her seat and stepped upon the first step leading from the rear platform of the car in which she had been seated, while waiting there for the train to stop, the conductor, carelessly and negligently seized her by the arm, and with force, while the train was in motion, without fault on her part, pulled her violently on to the platform of the depot.

Damages in the sum of \$5,000 are alleged to have accrued to the wife on account of internal injuries sustained by the misconduct of the conductor.

A demurrer was overruled to the complaint, after which, upon issues joined, the cause was tried by a jury, with the result that a verdict and judgment were rendered for the plaintiff. The ruling on the demurrer is complained of.

The appellant contends, the husband having joined his wife in suing for a personal injury to the latter, that as the complaint stated no cause of action in favor of both, the demurrer for want of sufficient facts was well taken.

The general rule is, as the appellant argues, that a complaint, to withstand a demurrer, must state a cause of action in favor of all the plaintiffs. *Holtzman v. Hibben*, 100 Ind.

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338; *Darkies v. Bellows*, 94 Ind. 64; *Parker v. Small*, 58 Ind. 349.

An exception occurs, when, as in this case, the plaintiffs are husband and wife, and the action relates to injuries to the person or character of the latter. In such cases, while it is not necessary, it is not improper, to join the husband. *Hamm v. Romine*, 98 Ind. 77; *Roller v. Blair*, 96 Ind. 203; *Rogers v. Smith*, 17 Ind. 323.

The complaint was to recover for the personal injuries sustained by the wife. It embraced no cause of action in favor of the husband. It was nevertheless, under the authorities cited, not subject to demurrer on that account. That the wife might have maintained an action in her own name, without joining her husband, as provided in section 5132, R. S. 1881, does not alter the case. That a different rule is held by some of the courts may be conceded. *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440, and cases cited. There was no error in overruling the demurrer to the complaint.

The correctness of the following instruction, given by the court, is next called in question :

"If you find for the plaintiffs, then you will determine from the evidence the amount the plaintiffs are entitled to recover, not exceeding, however, the amount demanded in the complaint; and in estimating the damages, if any are proved, you should take into consideration the injury inflicted upon the plaintiff, Lizzie Cosby, the pain and suffering undergone by her in consequence of her injuries, if any are proved, and also any permanent injury sustained by her, if the jury believe from the evidence that the said plaintiff has sustained permanent injury from the wrongful acts complained of, and also the expense of medical attendance, if any, and for loss of time occasioned by said injuries, if any is shown by the evidence."

This instruction proceeded upon the erroneous assumption that the jury were authorized to include in their assessment the damages recoverable by the husband, as well as those

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which the wife might recover for her separate use. This was a fatal error. Presumptively, the husband was entitled to maintain a separate action to recover for medical attendance, loss of service and of the society of his wife. He could not recover for these in an action in which his wife was suing for injuries to her person, nor could such damages be recovered by them jointly. It was equally impossible, as the complaint was framed, for the wife to recover for medical attendance, or loss of time. Her right was limited to recover for the injuries to her person, including pain, anguish of mind, and all such other damages as were not presumptively injuries to the husband. *Long v. Morrison*, 14 Ind. 595; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Baltimore, etc., R. W. Co. v. Kemp*, 61 Md. 74 (47 Am. R. 381n); *Oregon v. Brooklyn, etc., R. R. Co.*, 75 N. Y. 192 (31 Am. R. 459); 2 Wood's *Railway Law*, 1245.

In Iowa, by statute, in a suit by a husband and wife, for injuries to the wife, the husband may join thereto claims in his own right. *McDonald v. Chicago, etc., R. R. Co.*, 26 Iowa, 124.

In support of the charge under consideration, it is plausibly argued that, inasmuch as, under the statute of 1881, a married woman has power to incur liability for medical attendance, and since she has the right to the profits of her own labor, such attendance and loss of time constituted proper elements of damage in her favor.

That the situation of a married woman might be such that in an action for an injury to her person she might also recover for medical attendance, and for loss of time, may be conceded, but to warrant such a recovery some special circumstances, rebutting the presumptive right of the husband, must be averred and proved. No claim is made of any such averments or proof.

The appellant requested the court to instruct the jury, that in order "to justify the assessment of damages for future or permanent disability, it must appear that continued or per-

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manent disability is reasonably certain to result from the injury complained of."

This was a proper instruction. In *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264, it is said the jury may "take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future loss and suffering are inevitable." That an injury may possibly result in permanent disability, will not warrant the assessment of damages for a possible disability, unless it is also reasonably certain to follow.

Rulings of the court having relation to the propriety of certain hypothetical questions propounded on both sides are presented for consideration. As these rulings involve the frame of the particular questions, rather than any principle, and as we think it scarcely possible that questions of that character could assume the same shape on a second trial, we do not consider them. For obvious reasons, the ruling of the court on the motion for a new trial, for newly discovered evidence, is not considered.

It only remains that we notice the insistence of appellee, based on *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332, to the effect that the bill of exceptions containing the evidence and instructions of the court is not in the record. The case under consideration is distinguishable from that relied upon. Besides, it may be considered that the case cited and relied upon is explained and in a degree modified by *Robinson v. Anderson*, 106 Ind. 152, where it is held that if a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit. Within this rule the bill of exceptions is properly in the record.

For the reasons given the judgment is reversed, with costs.

Filed June 4, 1886.

Wood *et al.* v. Beasley *et al.*

No. 12,626.

107	37
194	28

WOOD ET AL. v. BEASLEY ET AL.

WILL.—*Devise to Wife During Widowhood, and then to Heirs of Testator.*—

Where a testator devises real estate to his wife so long as she remains his widow, after which it is to be equally divided among his heirs, the widow's estate ceases at her marriage, and she can not claim as an heir on its termination.

From the Sullivan Circuit Court.

J. C. Briggs and *W. C. Hultz*, for appellants.

J. T. Beasley, *A. B. Williams*, *J. T. Hays* and *H. J. Hays*,
for appellees.

ELLIOTT, J.—The question presented by the ruling on the demurrer addressed by the appellees to the second paragraph of the appellant's cross complaint, is as to the proper construction of the following clause of the will of John Foxworthy, deceased: "I give and devise to my beloved wife, Mary E. Foxworthy, the farm on which we now live, in Sullivan county, Indiana, to have and to hold so long as she remains my widow, after which said real estate shall be equally divided among my heirs." We regard the construction put upon the will by the trial court as correct, for it seems to us that the will limits the estate of the appellant to the term of her widowhood. It is now settled law that a husband may by limitation restrict the estate of his surviving wife so that it shall terminate when she marries. *Hibbits v. Jack*, 97 Ind. 570 (49 Am. R. 478); *O'Harrow v. Whitney*, 85 Ind. 140; *Tate v. McLain*, 74 Ind. 493; *Brown v. Harmon*, 73 Ind. 412; *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240); *Coon v. Bean*, 69 Ind. 474; *Harmon v. Brown*, 58 Ind. 207.

It is contended by appellant's counsel that the word "heirs" controls the will so far as to carry to the widow an estate in fee upon the termination of her widowhood. We think otherwise. Our construction of the will is that the testator intended to devise his wife the limited estate specifically described, and nothing more. It would be a strained and un-

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natural construction that should make the will class with the heirs one who is expressly and clearly designated as the widow, and to whom a restricted estate is specifically devised. The word "heirs" may be, and often is, controlled by the words with which it is associated, and it is so here. *Ridge-way v. Lanphear*, 99 Ind. 251; *Shimer v. Mann*, 99 Ind. 190 (50 Am. R. 82); *Fountain Co., etc., Co. v. Beckleheimer*, 102 Ind. 76 (52 Am. R. 645); *Hadlock v. Gray*, 104 Ind. 596.

The question was presented in all material respects in *Brown v. Harmon*, 73 Ind. 412, as it is here, and it was there held, as we now hold, that a widow, to whom such a limited estate as that created by the will before us is devised, can not claim as an heir upon its termination.

The third paragraph of the cross complaint is founded upon an antenuptial contract and a deed executed pursuant to it. The appellees, after having unsuccessfully demurred to this paragraph, answered, and to that answer a demurrer was overruled, and on that ruling error is now assigned. Counsel for appellant say: "This paragraph of the cross complaint was drawn upon the theory that the antenuptial contract and conveyance were valid, and that the deed conveyed a life-estate to the widow; but upon more mature deliberation we are of opinion that the contract and deed were absolutely void." Upon this concession the cross complaint is utterly bad, for, unless the contract on which it was founded is valid, it is entirely without foundation. As the appellant's counsel concede that the cross complaint is without foundation, it is unnecessary to pass upon the sufficiency of the answer, as a bad answer is good enough for a bad cross complaint.

Judgment affirmed.

Filed June 3, 1886.

The State, *ex rel.* The Board of Comm'rs of Allen Co., v. Miller, Auditor.

No. 12,890.

107	39
140	421

THE STATE, EX REL. THE BOARD OF COMMISSIONERS OF
ALLEN COUNTY, v. MILLER, AUDITOR.

CHANGE OF VENUE.—*Repeal of Statute.*—So much of the act of March 10th, 1873 (section 414, R. S. 1881), relating to changes of venue, as applied to criminal cases, was impliedly repealed by sections 1778 and 1779, R. S. 1881.

SAME.—*Allowance to Counsel for Defence and Prosecution.*—*Liability of County in which Cause Originated.*—The court to which a criminal cause is taken on change of venue may, in its discretion, appoint counsel both to defend and to assist in the prosecution of such cause, and make allowances therefor out of the county treasury, which, under sections 1778 and 1779, may be collected from the county in which the cause originated.

SAME.—*Conclusiveness of Allowances.*—The allowances made under such sections, as to their conclusiveness, stand upon the same footing as those made under the sections of R. S. 1843, construed in *Board, etc.*, v. *Summerfield*, 36 Ind. 543.

From the Adams Circuit Court.

W. H. Coombs, R. C. Bell and S. L. Morris, for appellant.

J. T. France, J. T. Merryman, R. S. Peterson and E. A. Huffman, for appellee.

NIBLACK, J.—This was an application by the board of commissioners of the county of Allen, in the name of the State, for a writ of mandate against Lewis C. Miller, as auditor of Adams county, requiring him to issue his warrant upon the treasurer of the latter county for the alleged amount of expenses incurred and paid by Allen county in two trials of Frederick Richards, upon an indictment for murder, on a change of venue from said county of Adams.

The complaint was duly verified by affidavit, and stated, in general terms, that at the May term, 1884, of the Adams Circuit Court, Richards was indicted upon a charge of murder in the first degree; that, on June 4th, 1884, the venue of the cause was changed to the criminal court of Allen county, and the defendant transferred to the jail of that county for safe-keeping; that, on July 24th, 1884, Richards,

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on application to said last named court, was by the court permitted to defend as a poor person, and two attorneys were appointed to make such defence, and that on motion of the prosecuting attorney the court appointed two attorneys to assist in the prosecution, said attorneys to be allowed and paid such sums for such services as the court might specify; that at the April term, 1884, of said court, the case was tried and resulted in a verdict of guilty, with punishment of death affixed, which verdict was afterwards set aside by the court and a new trial granted; that, on October 31st, 1884, by order of the court and pursuant to the provisions of the act of the General Assembly, approved February 27th, 1883, abolishing said criminal court, said cause was transferred to the Allen Circuit Court, which thereafter appointed attorneys to assist to prosecute and defend the case on a second trial; that the case was tried at the February term, 1885, of the Allen Circuit Court, resulting in conviction, and a sentence of imprisonment for life; that said last named court duly audited and allowed the expenses which had been incurred by said Allen county in consequence of said change of venue and said trials, and a certified copy of the order of the court was exhibited and made part of the application, giving an itemized statement and total amount; that the same had been paid by Allen county; that such allowance had been duly certified and presented to the defendant as auditor, who refused to issue his warrant for such allowance, and an alternative writ of mandate was asked requiring him to do so, or show cause why he should not so issue his warrant.

The alternative writ was ordered to issue, whereupon the defendant appeared and demurred to the complaint.

The circuit court sustained the demurrer thus filed to the complaint, and the relator of the plaintiff declining to plead further, final judgment was rendered for the defendant. Consequently the only question presented by this appeal is, was the demurrer to the complaint rightly sustained?

We have no brief from the appellee, and hence no argu-

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ment against the sufficiency of the complaint. Nor is there anything in the record informing us as to the precise ground upon which the demurrer to the complaint was sustained; whether upon the ground that Adams county is not liable to pay any part of the amount demanded, or whether the objection was only to some of the items, or parts of the account accompanying the complaint. The fair inference, however, from the argument submitted on behalf of the appellant is, that the objection was to the allowances made to the attorneys appointed to assist in the prosecution of Richards, as well as to those assigned to the duty of conducting his defence, upon the assumption that there was at the time no law in force which authorized the Allen Circuit Court to make such allowances. The act of March 10th, 1873, Acts 1873, p. 221, made a comprehensive provision for the allowance and payment of all costs and expenses incurred by reason of changes of venue, whether in civil or criminal cases, and it was under that act that the case of *Gill v. State, ex rel.*, 72 Ind. 266, cited and much relied on by counsel, was decided. The body of that act is now known as section 414, R. S. 1881, and has been so designated and republished as applicable to changes of venue in civil cases. But whether the act is still in force for any purpose is a question not now fully before us. On that subject, see repealing section 1291, R. S. 1881. It is sufficient for the present emergency to hold that so much of the act as applied to criminal causes was superseded, and hence impliedly repealed, by sections 1778 and 1779 of the present criminal code. These latter sections are as follows:

"Section 1778. In all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, and the *per diem* allowance and expenses of the jury trying the cause, and of the whole panel of jurors in attendance during the trial.

"Sec. 1779. All costs and charges specified in the last preceding section, or coming justly and equitably within its pro-

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visions, shall be audited and allowed by the court trying such cause; but where specific fees are allowed by law for any duty or service, no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken."

It is now a well settled legal proposition that a circuit or a criminal court, as the case may be, may assign counsel to defend poor persons charged with crime, and may make allowances for services performed under such an assignment of counsel. *Webb v. Baird*, 6 Ind. 13; *Board, etc., v. Wood*, 35 Ind. 70; *Gordon v. Board, etc.*, 52 Ind. 322. It is, also, settled that a circuit or criminal court may, in its discretion, appoint an attorney to assist in the prosecution of a criminal offence, and make him an allowance therefor out of the county treasury. *Tull v. State, ex rel.*, 99 Ind. 238. It follows, as a necessary consequence, that the same powers are devolved upon a court to which a criminal cause is taken by a change of venue. This was decided by the case of *Gordon v. Board, etc., supra*, and was reaffirmed by the recent well considered case of *Board, etc., v. Courtney*, 105 Ind. 311. The reasonable inference, therefore, is, that allowances regularly made to attorneys, either for prosecuting or defending in a criminal cause by a circuit or criminal court, on a change of venue, come "justly and equitably within" the provisions of section 1778, above set out.

As to the conclusiveness of allowances made under the provisions of sections 1778 and 1779, in question, we think they ought to stand substantially upon the same footing as those made under the two sections of the Revised Statutes of 1843, set forth and construed in the case of *Board, etc., v. Summerfield*, 36 Ind. 543. Upon that point the case of *Gill v. State, ex rel., supra*, to which allusion has been made, is not now a precedent of binding authority, since it was decided under a law different from the statutory provisions both of 1843 and 1881, and no longer in force in criminal cases.

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Our conclusion is, that the complaint stated facts sufficient to require the appellee to show cause, if any he can, why he should not issue his warrant upon the treasurer of his county for the amount claimed to be due to the relator of the appellant, and that on that account the circuit court erred in sustaining the demurrer to the complaint. *State, ex rel., v. Morris*, 103 Ind. 161.

The judgment is reversed with costs, and the cause is remanded for further proceedings.

ZOLLARS, J., expressed no opinion in the cause.

Filed June 15, 1886.

No. 12,530.

**BLOOMINGTON SCHOOL TOWNSHIP OF MONROE COUNTY v.
THE NATIONAL SCHOOL FURNISHING COMPANY.**

SCHOOL TOWNSHIP.—*Contracts of Trustee.*—*Notice.*—In dealing with the trustee of a school township, all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by contracts which are shown to be authorized by law.

SAME.—*School Supplies.*—*Complaint on Contract for.*—*Necessary Averments.*—A complaint against a school township, on a contract for school supplies, to be good must allege that such supplies are necessary and suitable for the use of the public schools of the township, and that they have been delivered to and accepted by such township.

From the Monroe Circuit Court.

J. B. Mulky and *J. F. Pittman*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellee.

HOWK, C. J.—In this case, the first error of which complaint is here made by appellant, the defendant below, is the overruling of its demurrer to appellee's complaint.

The complaint was in two paragraphs. In the first paragraph, the appellee alleged that it was a duly organized cor-

107	43
137	80
107	43
137	433
107	43
146	475
107	43
163	340
163	341
163	660
107	43
164	103

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poration; that, on May 8th, 1883, appellant entered into a written contract with appellee, a copy of which contract was filed with and made part of such paragraph, by which contract appellant purchased of appellee certain goods therein named to the amount of \$155; that such goods, by the terms of such contract, were to be shipped to Frank R. Woolley, who was then the trustee of appellant, and such amount was to be paid immediately, on the receipt of such goods in the freight office in Bloomington, Indiana; that, in pursuance of such contract, appellee shipped such goods, marked as aforesaid, and they were received at such freight office in Bloomington; and that appellant had wholly failed to pay therefor, though requested so to do. Wherefore, etc.

In the second paragraph of its complaint, appellee sued for the recovery of the same alleged indebtedness, under the same written contract declared upon in the first paragraph. There is some difference in the phraseology of the paragraphs, but substantially the same facts were stated in each of the paragraphs of the complaint. We need not, therefore, give the substance even of the second paragraph of complaint.

The written contract, whereof a copy was filed with and made part of each paragraph of the complaint, was in the words and figures following, to wit:

"Contract for school supplies, made this 3d day of May, 1883, between the school trustee of Bloomington township, Monroe county, Indiana, and the National School Furnishing Company of Chicago, Illinois, for the following school supplies, the goods to be shipped by freight, marked 'Mr. Frank R. Woolley, freight office at Bloomington, Monroe county, State of Indiana':

"Lunar Telluric Globe;

"8 C. S. Sets of Monteith's Maps, U. S., Europe, etc.;

"8 Monteith's Grand Map of World;

"Bade's Reading Case;

"8 Monteith's Pictorial Charts and Hand-books;

"Blanchard's Historical Map;

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"Extra book for Charts, by mail at once; Total, \$155.

"Ship August 1st, 1883.

"For which the school trustee of said township agrees to pay to the National School Furnishing Company, the sum of one hundred and fifty-five dollars cash, on receipt of goods. If paid in a school order, the same shall bear interest at the rate of 8 per cent. per annum."

Appellant demurred to each paragraph of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer as to both paragraphs of complaint, and this ruling is assigned here as error.

We are of opinion that each paragraph of appellee's complaint was insufficient, and that the demurrer thereto ought to have been sustained. We do not doubt that, under the statutes in force at the time, appellant's trustee was authorized to purchase for the use of the free common schools of his township, such school supplies and furniture as were necessary and suitable for such schools; nor do we doubt his power, under such statutes, when such supplies and furniture had been delivered to and accepted by his township, to bind the school corporation whereof he is trustee, for the payment of the fair and reasonable price or value thereof. In the execution of the written contract, which is made the basis of the complaint in this case, appellee was affected with notice of the limited powers of appellant's trustee, under our laws. Such trustee does not and can not act as the agent merely of his township. He is a public officer, and his relations to his township, as the name of his office clearly imports, are all of a fiduciary nature. In dealing with such trustee, all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by his contracts, verbal or written, when it appears, or is shown by proper averment and proof, that such contracts are authorized by law. This is the doctrine of our decisions upon the

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point under consideration. *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Summers v. Board, etc.*, 103 Ind. 262 (53 Am. R. 512); *Platter v. Board, etc.*, 103 Ind. 360.

Upon the question we are now considering, the case in hand can not well be distinguished from *Reeve School Tp. v. Dodson, supra*. In the case cited, Dodson sued Reeve school township upon two promissory notes, executed by the trustee of such township, and each note recited that it was given for certain tellurians, purchased for the benefit of the schools of such township. The sufficiency of Dodson's complaint was the only question considered here; and it was held that, for the want of averments that the tellurians were necessary for the schools and suitable for use therein, and that they had been delivered to and accepted by the school corporation, such complaint was bad on a demurrer thereto for the want of sufficient facts. So, in the case under consideration, for the purpose of showing that appellant's trustee, in the execution of the contract sued upon, was acting within the scope of his limited powers, appellee ought to have averred, in each paragraph of its complaint, that the school supplies mentioned in such contract were necessary and suitable supplies for the use of the public schools of Bloomington school township; and, for the purpose of showing that such contract was a valid and binding obligation of the school corporation for the payment of the sum of money mentioned therein, appellee ought to have averred that such supplies had been delivered to and accepted by such school township. For the want of such averments as those indicated, each paragraph of appellee's complaint was clearly bad, and the overruling of the demurrers thereto was erroneous.

This conclusion renders it unnecessary for us now to consider or decide any of the questions arising under the other errors of which appellant complains.

The Falmouth and Lewisville Turnpike Company v. Shawhan.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to each paragraph of complaint, and for further proceedings in accordance with this opinion.

Filed June 16, 1886.

No. 12,196.

THE FALMOUTH AND LEWISVILLE TURNPIKE COMPANY
v. SHAWHAN.

107	47
131	349
107	47
136	318
107	47
148	557

TURNPIKE COMPANY.—*Written Contract.*—*Assessments on Stock.*—*Statute of Limitations.*—*Pleading.*—Where one signs the articles of association of a turnpike company, formed under section 3624, *et seq.*, agreeing therein to take and pay for a certain amount of stock, it is a written contract, the statute entering into and becoming a part of it, and an answer of the six years' statute of limitations, to a complaint to recover an assessment on the stock, is bad.

SAME.—*May Use Line Abandoned by Another Company.*—*Repairs.*—A turnpike company, organized to construct a road, may take the line abandoned by another company, and to keep its road in repair it may call in stock subscriptions.

PLEADING.—*Single Answer to Several Paragraphs of Complaint.*—*Practice.*—Where a single answer is filed to two paragraphs of complaint, it is not good on demurrer unless it is sufficient as to both.

From the Rush Circuit Court.

J. Q. Thomas and *J. J. Spann*, for appellant.

G. H. Punttenney and *A. B. Irvin*, for appellee.

ZOLLARS, J.—Appellant was incorporated in 1876, under section 3624, *et seq.*, R. S. 1881. The purpose of the incorporation, as declared in the articles of incorporation, was to construct and maintain a gravel road. Appellee was one of the incorporators, and a subscriber to the capital stock. He subscribed for eight shares of \$25 each. There is this stipulation in the articles of incorporation:

"And we, whose names and residences are hereto affixed,

The Falmouth and Lewisville Turnpike Company v. Shawhan.

each severally promises for himself to pay to said company, for the purpose herein set forth, the amount of money set opposite our respective names."

Certificates of stock to the amount subscribed were issued and delivered to appellee. The road was constructed as provided in the articles of incorporation. In August, 1883, the board of directors made an assessment upon the capital stock, and entered an order upon the books of the company that forty per cent. of the amount subscribed should be paid by the subscribers. Thirty days' notice of the assessment, and of the time and place when and where payments would be required, was given in a newspaper printed in the county.

These are the facts, substantially, as set up in the fourth paragraph of the complaint. The articles of incorporation were made a part of this paragraph. The other paragraphs, except the first, went out upon demurrer. The first is upon an account.

To these paragraphs, appellee filed an answer in eight paragraphs. A demurrer was sustained to all of them, except the first and eighth. The first was withdrawn. The demurrer to the eighth was overruled, appellant excepted, and declining to reply, judgment was rendered against it.

The eighth answer sets up that the cause of action stated in the first and fourth paragraphs of the complaint did not accrue within six years before the bringing of the suit. The plea is sufficient in form, and is a good answer to the first paragraph. But as it was filed as an answer to both paragraphs, it is not sufficient to withstand the demurrer unless good as an answer to each one of them.

If the contract set up in the fourth paragraph of the complaint is a contract partially in writing and partially in parol, the six years' limitation applies, and the answer is sufficient. If that contract is a contract wholly in writing, the six years' limitation does not apply, and the answer is not good. We think the contract is clearly a contract in writing. The case is readily distinguishable from the cases of *Board, etc., v.*

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Shipley, 77 Ind. 553, *High v. Board, etc.*, 92 Ind. 580, and *Hackleman v. Board, etc.*, 94 Ind. 36, cited by appellee. Here, there are two contracting parties. Appellee became a party to the contract by signing the articles of association, and thus agreeing in writing to take and pay for the stock. There is nothing stated in the articles of incorporation as to when the payments shall be made by him, but the statute provides that the board of directors may require payments from subscribers to the capital stock of the sums subscribed by them, at such times and in such proportions, and on such conditions as they shall see fit; and that they shall give notice of the payments thus required, and of the time and place, when and where to be made, at least thirty days previous to the time when such payments are required, in a newspaper printed in the county, etc. R. S. 1881, section 3636. This section is not only a part of the corporate being of appellant, but prescribes a rule of action in the transaction of its business. Appellee must be held to have contracted with reference to this section. Not only that, but it entered as a silent factor into and became a part of the contract between him and the corporation. He is as much bound by it as he would have been had its terms been written out and embodied in the written contract. *Bryson v. McCreary*, 102 Ind. 1, and cases there cited. Appellee's written contract, then, is, that he will pay for the stock in such sums, and at such times, as the board of directors may require, they giving the proper notice. When they make such an order and give such a notice, therefore, nothing is added to the contract, nor are its provisions in any way changed or affected. The making of the order and the giving of the notice amount to nothing more than a call or demand for the money which appellee, by his written contract, has agreed to pay upon such call. The contract is analogous to, and is no more a contract partially in writing and partially in parol, than is a promissory note payable on demand. *Ross v. Lafayette, etc., R. R. Co.*, 6 Ind. 297;

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Howland v. Edmonds, 24 N. Y. 307; *Bell v. Yates*, 33 Barb. 627.

The action here is upon the written contract. See *Fox v. Allensville, etc., T. P. Co.*, 46 Ind. 31; *Darrell v. Hilligoss, etc., Gravel Road Co.*, 90 Ind. 264. The six years' limitation, of course, does not apply, because, as to such contracts, the limitation is fixed by the statute at ten years. As long as an action upon that contract is not barred by the statute of limitations, so long may the assessments upon the capital stock, made by the board of directors, be collected. See *Foulks v. Falls*, 91 Ind. 315.

It is not necessary for us to decide whether the statute will begin to run from the date of the contract, or from the date of the order and notice by the board of directors. We hold that the six years' limitation does not apply, and, therefore, that the answer is bad as an answer to the fourth paragraph of the complaint.

Upon the cross assignment of errors, it is sufficient to say, that we have examined the answers to which a demurrer was sustained, and think that there was no error in sustaining the demurrer to them. We know of no reason why a turnpike company, organized to construct a road, may not take the line of road abandoned by another company, nor why it may not call in stock subscriptions to keep its road in repair.

The first paragraph of the complaint is too uncertain, but the court below sustained a motion to make the bill of particulars more certain. That order may yet be enforced.

Judgment reversed with costs, with instructions to the court below to sustain the demurrer to the eighth paragraph of appellee's answer.

Filed March 2, 1886; petition for a rehearing overruled June 17, 1886.

The Louisville, New Albany and Chicago Railway Company v. Bryan.

No. 12,838.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. BRYAN.

NEGLIGENCE.—*Railroad.—Complaint for Injury at Crossing.—Wilfulness.—Contributory Negligence.*—A complaint against a railroad company to recover damages for an injury received at a crossing, and alleged to have been "caused by the reckless, negligent and wilful conduct of the defendant's employees" in propelling a locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by bell or whistle, is not good as charging a wilful injury, and, there being no averment negating contributory negligence, it is bad on demurrer.

From the Clinton Circuit Court.

G. W. Easley, G. W. Friedley and W. H. Russell, for appellant.

J. B. Sherwood, for appellee.

MITCHELL, J.—This action was brought by Bryan against the railway company, to recover damages for killing one horse and injuring another, while both were being driven in a buggy, by the plaintiff, across the defendant's track, at a street crossing in the northern part of the city of Lafayette.

The complaint was in two paragraphs, one of which counted upon the negligence of the defendant, while the other was to recover for an injury alleged to have been purposely or wilfully committed. In the one paragraph suitable averments, to the effect that the plaintiff exercised due care, and was without fault, are found. In the other no such averments are contained.

By their general verdict, the jury found for the plaintiff on the latter paragraph, and for the defendant on the first. Judgment was rendered accordingly.

One of the errors assigned is, that the court erred in overruling a demurrer to that paragraph of the complaint upon which the verdict and judgment against the appellant rest.

There being no averment that the plaintiff was without fault, an inference arises that he may have been guilty of

107	51
124	508
134	677
136	281
107	51
139	643
107	51
146	433
107	51
149	499
149	510
151	619
107	51
153	68
158	70
158	277
158	278
107	51
162	469

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contributory negligence, and, therefore, unless the complaint, by the specific statement of facts, rebuts this inference, or charges that the injury was purposely and wilfully committed, it states no cause of action.

The charging part of the paragraph is in these words:

"And that said collision was caused by the reckless, negligent and wilful conduct of said employees and servants of said defendant in the management of said locomotive, in this, to wit: That said locomotive was being propelled at an exceedingly high and dangerous rate of speed, and was being propelled backwards, and that the whistle on said locomotive was not sounded, and the bell was not rung, to give warning of the approach of said locomotive, by the employees and servants of said defendant in charge of said locomotive; that said crossing was made extra-dangerous by the track being hidden from view for some distance by intervening buildings, all of which was well known to said defendant, and its servants and employees, as aforesaid."

The general charge is, that the collision was caused by the reckless, negligent and wilful conduct of the defendant's employees and servants.

The specific acts of wilfulness charged are, that they propelled the locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by ringing the bell, or sounding the whistle.

That the conduct imputed to the employees of the railway company was negligent, can not be doubted, but negligence, no matter how gross, can not avail in an action where it is necessary, on account of the plaintiff's contributory negligence, to aver and prove that the injury was inflicted by design or with an actual or constructive intent. In such a case, it is incumbent on the plaintiff to aver and prove that the injury was intentional, or that the act or omission which produced it was wilful and of such a character as that the injury which followed must reasonably have been anticipated

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as the natural and probable consequence of the act. Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury. Or it must appear that the injurious act or omission was by design, and was such—considering time and place—as that its nature and probable consequence would be to produce serious hurt to some one. To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi criminal*. *Louisville, etc., Canal Co. v. Murphy*, 9 Bush, 522; *Louisville, etc., R. R. Co. v. Filbern*, 6 Bush, 574; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235.

The facts averred fail to bring the case within either of the foregoing conditions, or to indicate an actual or constructive intent on the part of the appellant. It does not appear that its employees knew of the presence of the plaintiff or his team, nor is there anything averred from which it can be inferred that the crossing and its surroundings were such as that the natural and probable consequence of running an engine over the highway in the manner described, would result in an injury. The facts are in no wise different from those involved in the ordinary case, where a locomotive is run over a highway at a high rate of speed, without giving the statutory signals. These are merely acts of non-feasance, not of aggressive wrong. The consequences of undenied contributory negligence can not be avoided in such a case by the fact that the track was "hidden from view for some distance by intervening buildings." That the appellant may have been grossly and culpably negligent, may be admitted, but until the plaintiff is willing to assert that he was himself without fault, he is not, upon the specific facts stated in the paragraph under consideration, entitled to maintain an

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action. *Louisville, etc., R. W. Co. v. Schmidt*, 106 Ind. 73; *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27; *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286 (48 Am. R. 719); *Pennsylvania Co. v. Sinclair*, 62 Ind. 301 (30 Am. R. 185); *Indianapolis, etc., R. R. Co. v. McClaren*, 62 Ind. 566; *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398.

The words "wilful" and "negligent," used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and wilful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. It seems to be supposed that by coupling the words together, a middle ground between negligence and wilfulness, between acts of non-feasance and misfeasance, may be arrived at. It is only necessary to say that the distinction between cases falling within the one class or the other, is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other. Beach Cont. Neg. 67, 68.

What has been said disposes of all other pertinent questions arising on the instructions, given and refused.

The demurrer to the paragraph of the complaint under consideration should have been sustained. For the error in overruling it, the judgment is reversed, with costs.

Filed June 16, 1886.

107	54
108	304
107	54
144	19
144	433
107	54
155	370
156	227
156	229
156	230
107	54
1166	489

No. 13,030.

BILLINGS v. THE STATE.

CRIMINAL LAW.—*Decedent's Estate a Person*.—The estate of a decedent is a person in legal contemplation.

SAME.—*Forging Name of Deceased Person*.—One who forges the name of a deceased person to an instrument purporting to be a promissory note, for the purpose of defrauding his estate, is guilty of the crime of forgery.

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SAME.—Plea in Abatement.—Omissions.—Omissions or defects in a plea in abatement can not be supplied or cured by intendment.

SAME.—Trial Without Plea Erroneous.—Practice.—The trial of a criminal case without a plea is erroneous, but the error must be presented by a motion for a new trial, and not by the assignment of errors in the Supreme Court.

SAME.—Information.—Mistake.—Motion in Arrest.—Where the whole information, taken together, shows that the charge of the offence is preferred by the prosecuting attorney, the use, by mistake, of the word "affiant" in the body of the indictment instead of the words "prosecuting attorney," is not a defect available on motion in arrest of judgment.

NIBLACK, J., dissents.

From the Daviess Circuit Court.

J. Baker and *A. J. Padgett*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, J.—The information charges that the appellant forged the name of Louis C. Morgan, deceased, to an instrument purporting to be a promissory note; that the forgery was committed after his death, and was committed for the purpose of defrauding the estate of Louis C. Morgan.

The objection urged against this information is, that it does not aver that the forgery was committed with the intent to defraud any person. The reason advanced in support of this proposition is, that the law does not regard the estate of a decedent as a person. This contention can not prevail. The estate of a decedent is a person in legal contemplation. "The word person," says Mr. Abbott, "in its legal signification, is a generic term, and includes artificial as well as natural persons." 2 Abbott Law Dictionary, 271; *Douglass v. Pacific, etc., Co.*, 4 Cal. 304; *Planters', etc., Bank v. Andrews*, 8 Porter (Ala.) 404. It is said in another work that "Persons are of two kinds, natural and artificial. A natural person is a human being. Artificial persons include (1) a collection or succession of natural persons forming a corporation; (2) a collection of property to which the law attributes the capacity of having rights and duties. The latter

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class of artificial persons is only recognized to a limited extent in our law; examples are—the estate of a bankrupt or deceased person.” 2 Rapalje & Lawrence Law Dictionary, 954.

Our own cases inferentially recognize the correctness of the definition given by the authors from whom we have quoted, for they declare that it is sufficient in pleading a claim against a decedent's estate to designate the defendant as the estate of the deceased person, naming him. *Ginn v. Collins*, 43 Ind. 271. Unless we accept this definition as correct, there would be a failure of justice in cases where, as here, the forgery is committed after the death of the person whose name is forged, and this is a result to be avoided if it can be done consistent with principle. We perceive no difficulty in avoiding such a result, for, to our minds, it seems reasonable that the estate of a decedent should be regarded as an artificial person. It is the creation of law for the purpose of enabling a disposition of the assets to be properly made, and, although natural persons as heirs, devisees, or creditors, have an interest in the property, the artificial creature is a distinct legal entity. The interest which natural persons have in it is not complete until there has been a due administration, and one who forges the name of the decedent to an instrument purporting to be a promissory note, must be regarded as having intended to defraud the estate of the decedent and not the natural persons having diverse interests in it, since he can not be presumed to have known who those persons were or what was the nature of their respective interests. The fraudulent intent is against the artificial person, the estate, and not the natural persons who have direct or contingent interests in it.

The appellant filed a plea in abatement, but we deem it only necessary to say of this plea, that an incomplete sentence leaves it in such a condition as to make it fatally defective. It is a familiar rule that omissions or defects in a plea in abatement can not be supplied or cured by intendment.

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The record shows that the trial court sustained a demurrer to the plea, and that, thereupon, a jury was called and sworn and evidence heard, but it does not show an arraignment or a plea. No objection was made below in any form to the failure of the court to arraign the defendant or to require him to plead to the indictment. The question is made for the first time by the assignment of errors in this court. If the question had been properly saved, it would be our duty to reverse the judgment, for in criminal cases there must be a plea, as a trial without a plea is certainly erroneous. *Tindall v. State*, 71 Ind. 314, and cases cited; *Weaver v. State*, 83 Ind. 289; *Sanders v. State*, 85 Ind. 318, see p. 332 (44 Am. R. 29). On the authority of *Shoffner v. State*, 93 Ind. 519, it must, however, be held that the question is not properly presented. It should have been presented, as that case declares, by a motion for a new trial.

Judgment affirmed.

Filed April 23, 1886.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the argument on the petition for a rehearing it is insisted that we did not decide one of the points made by counsel as to the sufficiency of the information. The argument upon this point in the original brief was exceedingly meagre, as counsel evidently relied upon other points for the reversal of the judgment. As stated in the original brief the objection now under discussion was, that “the prosecuting attorney nowhere charges the forgery of the note, by making the same or causing it to be done,” and this objection is discussed at much length in the brief on the petition. We think it without merit. The introductory clause of the information reads thus: “Hiram McCormick, the prosecuting attorney of the Forty-ninth Judicial Circuit, prosecuting the pleas of the State of Indiana, gives the court to know and be informed that heretofore, to wit,” etc. The conclusion of the information reads thus: “So the said prosecuting attorney says

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that said Jesse Billings was then and there guilty of forgery." In the body of the information the word "affiant" is used where the words "prosecuting attorney" should be employed, and on this mistake is founded appellant's argument, but the whole information taken together clearly and unmistakably shows that the charge was preferred by the proper officer. As this appears, we can not hold that there was any defect in the information available on a motion in arrest of judgment.

We do not deem it necessary to again discuss the questions considered by us in our former opinion.

Petition overruled.

NIBLACK, J., dissents from this opinion.

Filed June 17, 1886.

No. 12,168.

ROCHE v. MOFFITT ET AL.

MORTGAGE.—*Foreclosure.*—*Personal Judgment.*—*Promissory Note.*—*Complaint.*—*Exhibit.*—Where a complaint to foreclose a mortgage, and for personal judgment on the note secured by it, does not set out or exhibit the note or a copy, it is bad on demurrer.

SAME.—*Practice.*—Where the complaint demands judgment for a specified sum, and the plaintiff takes a personal judgment on the note secured by the mortgage, he can not claim on appeal that his demand was for a foreclosure merely.

From the Huntington Circuit Court.

J. B. Kenner, J. I. Dille, L. P. Milligan and O. Whitelock,
for appellant.

B. M. Cobb and B. F. Ibach, for appellees.

NIBLACK, C. J.—This action, in its original form, was simply and only a proceeding by John Roche against Patrick W. Moffitt and Ann R. Moffitt, his wife, as mortgagors, and John Mishler, Patrick O'Brien and William Ewing, as per-

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sons having some interest in the mortgaged lands, to foreclose a mortgage on certain real estate in Huntington county.

Mishler, O'Brien and Ewing filed cross complaints, each setting up and asserting a separate interest in the mortgaged lands as mortgage creditors holding a lien thereon. Upon the proceedings which ensued, the plaintiff, Roche, obtained a decree of foreclosure against Moffitt and wife, and Mishler, O'Brien and Ewing severally had judgment in their favor, in the nature of a several decree of foreclosure, upon their respective cross complaints. An appeal to this court resulted in a reversal of so much of the general decree entered in the premises as constituted a judgment in favor of Mishler, O'Brien and Ewing respectively. *Moffitt v. Roche*, 77 Ind. 48. Another branch of some of the matters involved in this appeal, was also before this court in the case of *Moffitt v. Roche*, 76 Ind. 75.

After this cause was remanded to the circuit court, the children and heirs at law of Mishler, who had in the meantime died, as was alleged, intestate and without leaving any unpaid indebtedness against his estate, filed an amended and substituted cross complaint against the plaintiffs, and all their co-defendants, averring that they were then the holders and owners of the note executed to the said Mishler by Moffitt, McCurdy & Co., and more particularly described in the opinion in *Moffitt v. Roche*, 77 Ind. 48, and praying judgment for \$1,500, and the foreclosure of the mortgage given to secure the payment of that and other notes, to which reference is also made in the same opinion. Like amended and substituted cross complaints were severally filed by O'Brien and Ewing upon the notes held by them respectively. Several new parties defendants were also made after the cause was remanded. Demurrers were severally overruled to all the cross complaints, filed as above, and issues being formed upon them, the circuit court made a finding that the cross complaints were based upon the promissory notes respectively counted upon by them; that there was then due and owing to the

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said children and heirs at law of Mishler, upon the note held by them for principal, interest and attorney's fees, the sum of \$961.27; that said children and heirs at law were entitled to a foreclosure of the mortgage set out in their cross complaint as against the plaintiffs, as well as against all their co-defendants. A judgment of recovery was thereupon rendered in favor of Mishler's children and heirs, against all the defendants to the cross complaint except O'Brien and Ewing, and a decree of foreclosure of the mortgage was accordingly entered. Like findings were respectively made, and like judgments and decrees were severally rendered in favor of O'Brien and Ewing, excepting in each judgment of recovery only the other co-cross complainants.

Neither the note described, nor a copy of it, was filed with the amended and substituted cross complaint of Mishler's children and heirs, and counsel for Roche claim that for that cause, if for no other, his demurrer to that cross complaint ought to have been sustained. Counsel upon the other side, in response, argue that the cross complaint in question did not really demand a personal judgment on the note, but was only, in its legal effect, a complaint for the foreclosure of the mortgage executed to secure the note, citing the cases of *Shin v. Bosart*, 72 Ind. 105, and *Sperry v. Dickinson*, 82 Ind. 132, as sustaining the position that, in the case of a demand for a foreclosure merely, neither the note, nor a copy of it, need be filed with the complaint.

We are unable to place upon the cross complaint the construction which counsel for the appellees thus seek to maintain. As has been seen, that pleading contained a general demand for judgment for a specified sum upon the facts alleged by it, that is, upon the indebtedness evidenced by the note, and that was followed by a finding as to the amount due upon the note, including attorney's fees stipulated for by it. Upon that finding counsel for the complainants in the cross complaint took a personal judgment against all the remaining parties to the suit besides themselves, except two.

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By these proceedings counsel, lastly above named, inferentially gave the cross complaint a construction different from that which they now ask us to place upon it—a construction from which it is now too late for them to recede.

The demurrer to the cross complaint of Mishler's children and heirs ought, therefore, to have been sustained, and for that reason the judgment entered upon that cross complaint must be reversed.

It is neither practicable nor necessary that we shall enter into a review of all the pleadings upon which questions are made, or attempted to be made, at the present hearing. It is sufficient for us now to say that enough was shown by the pleadings in question to indicate very clearly that the controversy which resulted in this appeal is one in which all the parties interested in the mortgaged lands ought to be at the same time before the court below, and in which the equities, as between all such parties, ought to be adjusted in connection with the final decree of foreclosure which it may be necessary to enter against any and all of the mortgaged lands. For the reasons already given, the personal judgments rendered in favor of O'Brien and Ewing upon their respective cross complaints were erroneously rendered as against all the parties who became defendants in such judgments, except the surviving members of the firm of Moffitt, McCurdy & Co., and, on that account, those judgments, as they now remain of record, would stand in the way of a proper future and final adjustment of the respective rights of those interested in or having claims upon the mortgaged lands in question. Consequently, those judgments, as well as the decrees of foreclosure which were entered upon them, ought also to be reversed. Works Ind. Prac., sections 417, 418; 2-Jones Mortg., sections 1283, 1381, 1382, 1435.

The respective judgments upon the cross complaints, herein above named, are accordingly reversed, with costs, one-third to be taxed against Elizabeth Mishler, Joseph Mishler, Abraham Mishler, Jacob Mishler and Mary Doub, as the chil-

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dren and heirs at law of John Mishler, deceased, one-third against Patrick O'Brien, and the remaining one-third against William Ewing, and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Dec. 29, 1885; petition for a rehearing overruled June 17, 1886.

No. 13,108.

MULREED v. THE STATE.

INTOXICATING LIQUOR.—Sale to Minor.—Due Care.—To relieve one from the penalty provided by the statute for selling intoxicating liquor to a minor, it is not enough that the seller believed in good faith from appearances that the minor was of legal age, but it must also be shown that the former used due care to ascertain his age.

SAME.—Sufficiency of Evidence.—For evidence held sufficient to sustain a conviction for selling intoxicating liquor to a minor, without exercising proper caution, notwithstanding the latter was apparently of legal age, see opinion.

CRIMINAL LAW.—Jury.—Reading Statutes While Considering Verdict.—Sensible, that it is not error, in a criminal case, to permit the jury to take to their room an annotated copy of the Revised Statutes, and to read therefrom, while deliberating on their verdict, the section of the statute defining the offence for which the defendant is prosecuted, where the annotations thereto consist merely of the names of decided cases.

From the Delaware Circuit Court.

J. N. Templer and *J. F. Sanders*, for appellant.

F. T. Hord, Attorney General, *W. B. Hord* and *C. L. Medsker*, Prosecuting Attorney, for the State.

Howk, C. J.—In this case, the appellant was indicted, tried and convicted for an unlawful sale of intoxicating liquor to a certain person, who was then and there under the age of twenty-one years. From the judgment of conviction he has appealed to this court, and has here assigned, as error, the overruling of his motion for a new trial.

A number of causes for such new trial were assigned by

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appellant, in his motion therefor; and these causes we will consider and pass upon in the same order his counsel have presented and discussed them in their exhaustive brief of this case.

1. It is first insisted by appellant's counsel, that the verdict of the jury was not sustained by sufficient evidence and was contrary to law. The indictment charged that appellant, on the 11th day of October, 1884, at Delaware county, unlawfully sold to one George Ross, who was then and there a person under the age of twenty-one years, one gill of intoxicating liquor, to wit, beer, at and for the price of five cents. The cause was tried on April 23d, 1885, and only two witnesses testified on the trial, namely, George Ross, to whom the unlawful sale was made as charged, and the appellant. There is no conflict in the evidence, as it appears in the record. It is conclusively shown by the testimony of both witnesses, that, about the time charged in the indictment, appellant sold George Ross a glass of beer for the price of five cents; and Ross testified that he "was nineteen years old at that time, and under twenty-one years old." In section 2094, R. S. 1881, it is provided as follows: "Whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquors to any person under the age of twenty-one years, shall be fined in any sum not more than one hundred dollars, nor less than twenty dollars."

It is apparent from what we have said, that the evidence in the record of this cause, without conflict therein, makes a case against the appellant fairly within the letter of our statute. It is claimed, however, by appellant's counsel, that the verdict is not sustained by the evidence, because, they say, it is shown thereby that appellant made the sale to George Ross, as charged in the indictment, in the honest and reasonable belief that Ross was of the full and lawful age of twenty-one years, at the time of such sale. If the evidence fairly showed, without conflict, that appellant made such sale to

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George Ross, after exercising proper caution, in the reasonable and honest belief that Ross, at the time of such sale, was of full and lawful age, then the verdict would not be sustained by the evidence, and, for this cause, it would have been error to have overruled the motion for a new trial. This would be so, because, in such case, there could be no criminal intent on the part of appellant, and, in the absence of such intent, there could be no criminal violation of our statute making the sale of intoxicating liquor to a minor a public offence. This is settled by our decisions. *Goetz v. State*, 41 Ind. 162; *Payne v. State*, 74 Ind. 203; *Hunter v. State*, 101 Ind. 241; *Kreamer v. State*, 106 Ind. 192.

In the case in hand, it was shown by the evidence that at the time of the sale charged in the indictment, George Ross was five feet ten inches in height, weighed one hundred and sixty-five pounds, and had a heavy beard and a man's voice. Appellant testified about Ross as follows: "I thought from his appearance and size, the beard on his face, his voice and his general appearance and manner, that he was more than twenty-one years old; and so believing in good faith, I didn't ask him his age, but drew the glass of beer and gave it to him, and he drank it and paid me five cents for it, and left. I had no doubt of his age being over twenty-one years; he looked like it and acted like it."

Notwithstanding this strong showing in favor of appellant, on the point we are now considering, we are of opinion that the jury were fully authorized, by appellant's own testimony, to determine such point against him. On his cross-examination, appellant testified as follows: "I have known the witness, George Ross, when I would see him, for ten or a dozen years; have not been much with him during that time. I did some ditching for his father, ten or a dozen years ago, and saw the witness then at his home. He was then a lad, seemingly about ten or twelve years old." In this testimony, appellant was speaking of and concerning facts, and was not expressing his belief merely, as a part of his defence. As against

himself, the jury were justified in saying that, by his testimony, he admitted that he knew the witness, George Ross, ten years ago, and he was then a lad ten years of age, which would make him only twenty years old at the time of the trial of this cause, or only nineteen years of age at the time of the sale charged in the indictment. With this testimony of appellant before the jury, we can not say they were not justified in finding, as they must have done under the instructions of the court, that appellant did not make the sale, charged in the indictment, after exercising proper caution, in the reasonable and honest belief that George Ross, at the time of such sale, was of full and lawful age. We can not disturb the verdict on the evidence.

2. Appellant's counsel next insist, in argument, that the trial court erred in modifying three written instructions, requested by appellant, and in giving the jury such instructions so modified, and in refusing to give the jury the instructions asked for, without such modification thereof.

These instructions, as modified by the court and given, were substantially as follows :

" 1. If the jury believe from the evidence that the defendant, when he sold the beer in question, *after exercising due care to ascertain his age*, had good reason to believe, and, in good faith, did believe, George Ross to be then 21 years old or over, they should find the defendant not guilty.

" 2. One important question in the case is, whether the defendant was acting in good faith in supposing George Ross, the purchaser, to have been 21 years old or over, at the time he sold him the beer. A sale of intoxicating liquor to a minor, under the belief, entertained in good faith, *after exercising due care to ascertain his age*, that he was 21 years old or over, at the time of the sale, is not a violation of the law.

" 3. If the jury believe from the evidence that the defendant sold the beer in question under the belief, entertained in good faith, *after having used due care to ascertain his age*, that

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George Ross, the purchaser, was 21 years old or over, they should acquit the defendant."

In each of these three instructions we have italicized the court's modification thereof. It will be seen that by such modification the court instructed the jury that the defendant, in such a case as this, could not escape the punishment prescribed by law for the unlawful sale of intoxicating liquor to a minor, upon his *bona fide* belief that such minor was of lawful age, based solely upon appearances, but it must also be shown that he had used due care to ascertain the minor's age. This is in substantial harmony, we think, with our decisions upon the question under consideration. Thus, in *Goetz v. State*, *supra*, the court said: "A sale of intoxicating liquor to a minor under the belief, entertained in good faith, that he was an adult, is not within the statute. But the burden of proof on this subject is on the defendant; and to make out this defence, such facts must be shown as will justify the inference of such *bona fide* belief." So, in *Kreamer v. State*, *supra*, where the defendant made a sale to a minor, "after exercising proper caution, in the reasonable and honest belief that he was, at the time of such sale, of full and lawful age," it was held by the court that there was no criminal violation of our statute, which makes the sale of intoxicating liquor to a minor a public offence. We conclude, therefore, that the court did not err in modifying the instructions requested by appellant, nor in giving the jury the instructions as modified, nor in refusing to give the jury the instructions asked for without modification.

3. Finally, it is claimed the court erred in permitting the jury to take to their room, and to consider, while deliberating on their verdict, an annotated copy of the Revised Statutes of 1881. The record before us fails to show, however, that appellant either objected or excepted at the time to the action of the trial court, of which his counsel now here complain as erroneous. The question, therefore, is not properly presented for our decision. If it were so presented, it would

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seem to us that as the jury are authorized by our fundamental law, in all criminal cases whatever, to determine the law as well as the facts, it could hardly be regarded as an available or reversible error, if any error at all, for the trial court to permit the jury, in any criminal cause, to read in their retirement the statute defining the offence for which the defendant is prosecuted in such case. The "annotations" complained of are merely references to decided cases, and could afford the jury no possible information, and could do the defendant no possible harm in the absence of the books referred to.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed June 15, 1886.

No. 12,222.

107	67
126	147

COOK v. CHAMBERS, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Fraudulent Conveyance*.—*Statute of Limitations*.—*Pleading*.—A complaint by an administrator to set aside a fraudulent conveyance made by his intestate, which shows on its face that at the time it was filed the latter had been dead more than five years, is bad on demurrer. Section 2334, R. S. 1881.

From the Knox Circuit Court.

G. G. Reily and W. C. Niblack, for appellant.

W. H. De Wolf and S. N. Chambers, for appellee.

MITCHELL, J.—The purpose of this action was to set aside a conveyance of lands, alleged to have been fraudulently made by Matilda A. Daniels to the appellant, Eliza M. Cook.

It appears from the complaint that Mrs. Daniels died intestate on the 3d day of February, 1877, and that, on the 19th day of the same month, Smiley N. Chambers was ap-

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pointed administrator of her estate. As such administrator he commenced this suit on the 26th day of May, 1882. Thus it appears that an administrator, more than five years after the death of his intestate, commenced a proceeding to avoid an alleged fraudulent conveyance made in the lifetime of his decedent.

An administrator, for the purpose of making assets with which to pay liabilities of an estate in process of settlement, is authorized to sell any lands fraudulently conveyed by his intestate, whenever the personal property is insufficient for the payment of the debts of the estate. Before procuring the order to sell, he may maintain an action to avoid the fraudulent conveyance. *Love v. Mikala*, 11 Ind. 227. He can not, however, maintain a proceeding to sell lands so conveyed unless the proceeding is instituted within five years after the death of his intestate. Section 2334, R. S. 1881; *Cox v. Hunter*, 79 Ind. 590; *Bushnell v. Bushnell*, 88 Ind. 403.

As he can only have the deed avoided preliminary to the institution of a proceeding to sell, in order to make assets to pay debts, it is manifest, if the preliminary step is delayed until after the right to institute a proceeding to sell is barred by the statute, the right to maintain proceedings to avoid the deed is also barred. Why should an administrator, whose right to avoid a deed of his intestate depends solely upon the fact that the land conveyed is required to make assets to pay debts, be permitted to avoid the deed, after his right to institute proceedings to convert the land into assets has been barred?

The administrator's right is purely statutory. The statute requires that it should be exercised within five years after the death of the intestate. After five years no such right exists so far as the administrator is concerned. A complaint to avoid such conveyance must show that the right to sell continues to exist. *Brucker v. Kelsey*, 72 Ind. 51. What the

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rights of creditors may be in this connection we need not now consider. *Bottorff v. Covert*, 90 Ind. 508.

Where a right which is not of common law origin is given by a statute which prescribes the time within which proceedings to enforce the right thus conferred must be commenced, a complaint to enforce such right, which shows on its face that the time limited has expired, is insufficient on demurrer. *Leard v. Leard*, 30 Ind. 171.

Where a statute of limitations merely bars a remedy, which exists independent of the statute, it must as a rule be pleaded. Where, however, it cuts off a right created by the same statute, it may be made available by demurrer.

In a case like this, where the right of action is conferred by a statute, which subjects the right to a condition requiring it to be exercised within five years, it should appear by an apt averment in the complaint that the death of the intestate had occurred within a period of five years next before the institution of the proceedings. *Cox v. Hunter*, *supra*.

The court overruled a demurrer to the amended complaint. This complaint showed on its face that it was filed in the October term, 1877, of the Knox Circuit Court. It contained no averment that proceedings to sell the lands had been instituted within five years from the death of the intestate, which appeared to have occurred February 3d, 1877. It was, therefore, error to overrule the demurrer to the complaint.

Judgment reversed, with costs.

Filed June 18, 1886.

No. 12,599.

ZENOR v. JOHNSON ET AL.

INSTRUCTIONS TO JURY.—Evidence.—Oral Admissions.—An instruction that oral admissions of a party should be received with great caution, because a witness may not have correctly understood them, or may not have correctly recollected and repeated them, is erroneous.

107	66
130	189
107	66
130	3

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SAME.—*Construction of Written Contracts.*—The court must construe all written contracts, and not leave the question of construction to the jury, except in cases where parol evidence is necessary to make a contract intelligible.

SAME.—*Mistake.*—It is only a mutual mistake of fact, and not a mistake of law, that will avoid a contract, and it is error to instruct the jury in general terms that a mistake will have that effect.

From the Harrison Circuit Court.

G. W. Denbo, W. N. Tracewell and R. J. Tracewell, for appellant.

G. W. Self, for appellees.

ELLIOTT, J.—The controversy in this case is as to the ownership of personal property, and there is much conflict in the evidence.

The appellant complains of the instructions of the court, and as we think with just reason, for there is much confusion and material error in them as they appear in the record.

The instructions on the subject of verbal admissions are in direct conflict with the rule declared by our decisions. An instruction that oral admissions of a party should be received with great caution, because a witness may not have correctly understood them, or may not have correctly recollected and repeated them, is erroneous. *Morris v. State, ex rel.*, 101 Ind. 560; *Newman v. Hazelrigg*, 96 Ind. 73; *Finch v. Bergins*, 89 Ind. 360; *Davis v. Hardy*, 76 Ind. 272; *Garfield v. State*, 74 Ind. 60.

It is error for the court to submit the construction of a written instrument to the jury, except in cases where the instrument is so ambiguous that the court can not give the instrument a reasonable construction. The court must construe all written contracts, and not leave the question of construction to the jury, except in a case where parol evidence is necessary to make the contract intelligible. This rule was violated by the court in this instance, for it was the duty of the court to inform the jury of the meaning of the written

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instrument given in evidence, and not to leave that matter, as was done, to the judgment of the jury.

There was some question as to whether the instrument had been altered by the appellant, and this, as a question of fact, ought to have been submitted to the jury under proper instructions, but it was error to leave the construction and effect of the contract to the jury.

It was also error to charge the jury in general terms, that, if there was a mistake in the written instrument, it was without effect. The court should have instructed the jury that it is only a mutual mistake of fact that will avoid a contract. Mistakes of law can not have that effect.

We do not deem it necessary to notice the other errors in the instructions, as the case must be again tried.

Judgment reversed, with instructions to grant a new trial to the appellant.

Filed June 18, 1886.

No. 13,011.

WAGNER v. THE STATE.

CRIMINAL LAW.—*Supreme Court.*—*Conflicting Evidence.*—A judgment will not be reversed on the evidence when it is conflicting.

SAME.—*Possession of Stolen Property.*—*Presumption.*—*Previous Good Character.*—Proof of previous good character is not sufficient to rebut the presumption of guilt which possession of stolen property raises.

From the Porter Circuit Court.

M. Nye, L. A. Cole, D. J. Wile and F. E. Osborn, for appellant.

F. T. Hord, Attorney General, *W. B. Hord*, and *E. D. Crumpacker*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution against Lawrence Wagner for grand larceny, based upon an affidavit made by

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the prosecuting witness and an information filed by the prosecuting attorney.

The property charged to have been stolen was a horse, of the estimated value of one hundred dollars, belonging to John Nelson and Charles P. Nelson.

The cause was, by agreement, tried by the court without a jury. The defendant was found guilty as charged, and, in addition to the assessment of a fine against him, he was adjudged to be imprisoned in the State's prison for the term of two years, and to be disfranchised for a definite period of time.

The only question here is upon the sufficiency of the evidence to sustain the finding of the circuit court.

John Nelson, the prosecuting witness, testified that the horse belonged to him and Charles P. Nelson, and was, with a bridle, taken from his stable in Porter county during the night succeeding the 1st day of January, 1886. Herman Stibbe and John Pike, respectively, testified that they were out hunting the next morning, that is to say, on the morning of the 2d day of January, 1886, and found the horse tied to a tree in the woods in Porter county, about three miles west of Michigan City, and several miles from where it was taken, where the undergrowth was thick; that a sack was lying on the ground near by containing horse feed and marked "Lorans Wagner"; that there was also a fire near by at which some cooking seemed to have been done; that as they approached the horse they saw the defendant walking rapidly away from the opposite side. Stibbe claimed to have been acquainted with the defendant for several years previously, and that he recognized him when he thus saw him walking away. Pike had no previous acquaintance with the defendant, but identified him at the trial as the person he saw hastening away from the horse at the time referred to. An hour or two later, the marshal of Michigan City finding the horse apparently abandoned, and still hitched in the woods, took charge of it, and on the following day caused it to be returned to its owner. In

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short, the evidence for the State made a well defined *prima facie* case of grand larceny against the defendant.

On behalf of the defendant several witnesses, more or less acquainted in the neighborhood in which he had lived, testified to his previous good character, and other witnesses claimed very positively to have been with him, or to have seen him, as late as midnight on the night during which the horse was stolen, and again next morning at his house, in Laporte county, fourteen miles from where the horse was found in the woods. Still other witnesses claimed to have accompanied him during the forenoon of the 2d day of January, 1886, to the city of Laporte, where still others insisted he remained until the next day. As a witness in his own behalf, the defendant denied having been away from his own house during the night on which the horse was alleged to have been taken, or during the next morning until he started to Laporte, and hence all connection with the taking, or attempted concealment, of the horse.

Conceding, therefore, the truth of all that was sworn to on the subject, proof of an *alibi* on the part of the defendant was complete.

The case presented is in consequence one resting upon irreconcilably conflicting evidence, and is, for that reason, a case in which the judgment can not be reversed upon the evidence. Counsel, arguing in support of this appeal, concede that the possession of recently stolen property raises a presumption against the person so found in possession of such property, to the extent of requiring him to give at least a reasonable account of the manner in which he came into such possession, but insist that proof of previous good character is sufficient to rebut the presumption of guilt thus raised, and that, under that rule of evidence, the defendant became entitled to an acquittal in this case, citing *Clackner v. State*, 33 Ind. 412, in support of their position.

Whatever the case thus cited may be construed as really deciding, we regard the doctrine contended for as above as

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against the great weight of authority. Proof of previous good character is admissible in this State on behalf of the defendant in all criminal prosecutions, as tending to have, or as likely to have, at least a mitigating influence in some respect favorable to the defendant, but the value of such proof, and especially its relative value, must always depend upon the circumstances of each particular case. Such proof may, in some cases, create a doubt in favor of the defendant where the circumstances in other respects tend to establish his guilt, but as to when such proof ought to be accepted as creating such a doubt, no definite rule can be stated. 1 Taylor Ev., section 326; Whart. Crim. Ev., sections 60, 67; *Kistler v. State*, 54 Ind. 400; *Rollins v. State*, 62 Ind. 46; *McQueen v. State*, 82 Ind. 72.

In the cause in hearing, the defendant did not admit his possession of the stolen property, and hence offered nothing in explanation of such a possession. If in fact he had possession of the horse in the woods as claimed by Stibbe and Pike, his hastening away and abandonment of the possession of the animal were, under the circumstances, seemingly inconsistent with an honest possession, and with previous good character. The theory of his defence was that as to him the case was one of mistaken identity, and in support of that theory evidence tending to prove an *alibi* was introduced. The proof of previous good character relied upon by counsel was not, consequently, in legal contemplation, admitted to rebut the presumption arising from the possession of the stolen property, but was rather to strengthen the evidence tending to prove an *alibi*, and in this way to increase the probabilities that the case was one of mistaken identity.

Unsatisfactory as the case may be in some of its features, and as all cases resting upon irreconcilably conflicting evidence upon a vital point must be to an appellate court, no sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed with costs.

Filed June 18, 1886.

The City of Fort Wayne v. Coombs *et al.*

No. 9889.

THE CITY OF FORT WAYNE v. COOMBS ET AL.

MUNICIPAL CORPORATION.—Defective Sewers.—Contributory Negligence.—Case Disapproved.—In actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from contributory negligence. *Roll v. City of Indianapolis*, 52 Ind. 547, disapproved.

SAME.—Use of Ordinary Care and Skill.—Notice of Defects.—Pleading.—Where a municipal corporation constructs a sewer, it is bound to use ordinary care and skill, and it is not necessary that it should be averred in a complaint for injuries resulting from the defective construction thereof, that the corporate authorities had notice of defects caused by want of skill or care in doing the work.

SAME.—Corporate Authorities Must Keep Sewer in Repair.—Implied Notice of Defect.—Notwithstanding the fact that a sewer may have been constructed with care and skill, a municipal corporation is liable for injuries caused by a negligent failure to keep it in repair; and where it is suffered to remain out of repair for such length of time as that it was the duty of the corporate authorities to take notice of its condition, the law will charge the corporate officers with notice.

SAME.—General Authority to Construct Sewers.—The authority to construct sewers is general, and resides in all municipal corporations unless expressly denied them by the Legislature.

SAME.—Use of Private Property.—Liability for Negligence in Constructing and Maintaining Sewer.—Where a municipal corporation makes use of private property for the purpose of constructing a sewer, and in order to obtain the privilege of using the property submits to the demand of the owner to construct the sewer according to plans and specifications prepared by him, it is liable for negligence in the construction and maintenance of such sewer.

SAME.—Outlet for Sewer.—The outlet is a necessary part of a sewer, and whenever a municipal corporation, by its system of sewerage, renders an outlet necessary, it must provide one, and it must be constructed with ordinary care and skill.

SAME.—Liability to Citizen who Taps Sewer, for Negligent Construction or Maintenance Thereof.—A municipal corporation is liable to one who, for his private benefit, connects his premises with a sewer constructed by such corporation, for injuries resulting from the negligent construction or maintenance thereof.

WITNESS.—Expert Testimony, Competency of.—Practice.—It is for the trial court to determine whether or not a witness is qualified to testify as an expert, and the question of his competency is so exclusively for the court that its action will not be reviewed, except where there is no evi-

107	75
188	178
107	75
130	146
107	75
145	320
107	75
157	528
107	75
158	241
158	242
107	75
161	216
107	75
163	212
107	75
164	576
107	75
165	181

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dence tending to prove the qualification of the witness, or there is a palpable abuse of discretion.

SAME.—*Preliminary Cross-Examination of Expert.*—If the evidence satisfies the trial court of the qualification of the witness, it is not bound to permit a preliminary cross-examination on the question of competency, though it has a right to do so, which right should be liberally exercised.

SAME.—*Qualification of Expert.*—The study of a profession or business, without practical experience, will qualify a witness as an expert.

EVIDENCE.—*Negligence.*—In an action against a city to recover for injuries caused by a defective sewer, constructed by the corporate authorities, evidence of a break in the sewer about 100 feet distant from the point where the break occurred which caused the injury for which recovery was sought, was competent for the purpose of charging the city with knowledge, as well as for the purpose of showing the defective character of the work and materials employed, and that by reason of time and use the sewer had got out of repair.

SAME.—In such case it is not error to permit the plaintiff to give in evidence the ordinance, advertisements, bids and contracts relating to the building of the sewer, as tending to show that the same was constructed by the city.

SAME.—*Validity of Ordinance Providing for Construction of Sewer.*—In such case it is not necessary for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted. It is enough to show that the city had assumed to adopt it, and under it had constructed the sewer.

From the Allen Superior Court.

H. Colerick, for appellant.

W. H. Coombs, J. Morris and R. C. Bell, for appellee.

ELLIOTT, J.—There are two paragraphs in the appellees' complaint, both seeking a recovery for injuries caused by a defective sewer. The difference in the paragraphs is that one alleges negligence in constructing the sewer, and the other alleges negligence in maintaining it. We shall not notice all of the objections to the complaint discussed by counsel, for we find upon an examination of the record that many of them are based upon a mistake as to its allegations.

We concur with counsel that where negligence is the issue the plaintiff must show that he was free from contributory fault, and that this is so whether the action is for injuries to per-

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son or property. The decision in *Roll v. City of Indianapolis*, 52 Ind. 547, on this point, is in conflict with the rule which has long prevailed in this court, and it can not be regarded as well decided. While it has not been in terms overruled upon this point, it has been by decisions which broadly and explicitly deny the doctrine which it asserts. *Lyons v. Terre Haute, etc., R. R. Co.*, 101 Ind. 419; *Wabash, etc., R. W. Co. v. Nioe*, 99 Ind. 152; *Stevens v. Lafayette, etc., G. R. Co.*, 99 Ind. 392; *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486, see p. 490; *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 40; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191, and cases cited, p. 192; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322.

To the cases we have cited many might be added, but it is not thought necessary, as the principle which they assert is a familiar one, and is decisively against the doctrine of *Roll v. City of Indianapolis, supra*, for the sole foundation of such an action as this is the negligence of the municipal corporation, and the case is a pure type of actions for the redress of injuries resulting from negligence. The principle so long and so firmly established inexorably demands the conclusion that in actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from contributory negligence.

We can not assent to counsel's assumption that the complaint does not aver that the plaintiffs were free from contributory fault. It is the rule in this State that a general allegation upon this subject is sufficient, and there is here such an allegation so framed as to cover all the acts, injuries and losses described in the complaint. We can find nothing in the complaint which is inconsistent with the general averment that there was no contributory negligence.

Where a municipal corporation constructs a sewer, it is bound to use ordinary care and skill, and it is not necessary that it should be averred that the corporate authorities had

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notice of defects caused by want of care and skill in doing the work. The doctrine that it must be shown that the corporation had notice of defects does not apply to defects in the work of constructing a sewer where the work is done by the corporation itself. Where a city undertakes to construct a sewer, and does it negligently, it is liable for injuries resulting from such negligence, without proof that it had notice of the defects. 2 Dillon Munic. Corp. (3d ed.), section 1024.

Where a sewer is constructed with care and skill, a municipal corporation is liable for injuries for negligently failing to keep it in repair, and where it is suffered to remain out of repair for such a length of time as that it was the duty of the corporate authorities to take notice of its condition, the law will charge the corporate officers with notice. In this case the complaint alleges that the sewer was suffered to remain out of repair for two years prior to the injury done to the plaintiffs' property, and there can be no doubt that this was sufficient to charge the corporation with notice. There are many cases holding that notice will be implied where a sewer or a street is suffered to remain in a defective condition for a much shorter period of time. *City of Madison v. Baker*, 103 Ind. 41; 2 Dillon Munic. Corp. (3d ed.), section 1025.

It is alleged in the fourth and fifth paragraphs of the appellant's answer that it had no authority to construct a sewer under the Wabash and Erie Canal without the permission of, and in the manner prescribed by, the officers of the canal company; that it was necessary to provide an outlet for the sewer to cross under the canal; that the appellant did secure permission to carry the sewer under the canal, and did construct it according to plans and specifications prepared by the canal company's engineer. To these answers the appellees replied that at the time of the construction of the sewer in Clinton street, that street was, and had been for more than twenty years, a public street, and that it crossed the canal at right angles; that the sewer was constructed on the line of the street to the canal; that the city, at the time of the construction of

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the sewer on Clinton street, had constructed other sewers, and in order to provide an outlet for these sewers it was necessary to cross the canal. The court overruled a demurrer to the reply.

The right of the public in the street was not lost by the occupancy of the land by the canal company; on the contrary, the right of the public to make use of the street in any lawful manner that did not injure the canal company or impair its rights remained in the public. *City of Logansport v. Shirk*, 88 Ind. 563; *Shirk v. Board, etc.*, 106 Ind. 573.

We suppose it can not be doubted that the city might have built a bridge over the canal provided there was no interference with the company's rights, and if it could do this, surely it might construct a sewer beneath the channel of the canal. We can not yield to a doctrine that would lead to a denial of the right of the public to enjoy and use its highways, where such use and enjoyment would work no injury to the canal company. While we recognize the doctrine of the decisions following *Water-Works Company v. Burkhart*, 41 Ind. 364, we do not regard them as going to the extent of holding that the public lost its right to use and enjoy its highways in a lawful manner, although we do regard them as holding that neither the public nor a citizen can do any act that will interfere with the use of the canal property for canal purposes. We should, therefore, have no hesitation in upholding the reply on the ground assumed by appellee, that the public had not lost its rights if it affirmatively appeared that the highway existed before the canal was constructed; but, as this does not appear, a further discussion is necessary.

It is alleged that a highway called Clinton street crossed the canal, and that it had been in use for more than twenty years. This establishes the important fact that there was a lawfully existing highway, since user for twenty years vests an indefeasible right in the public. *Strong v. Makeever*, 102 Ind. 578. As the city had exclusive authority over the highway, it had an undoubted right to use it for any purpose for

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which a highway might lawfully be used, and it is well settled that the use of highways for sewerage purposes is a lawful one. *Cummins v. City of Seymour*, 79 Ind. 491, see p. 498 (41 Am. R. 618); 2 Dillon Munic. Corp., sections 656, 688; Angell Highways, section 216. The appellant, therefore, had authority to construct this sewer, and it can not escape liability to one who has suffered an injury from its negligence on the ground that it yielded its rights to the groundless demand of the canal company.

The authority to construct sewers is a general one, and resides in all municipal corporations unless expressly denied to them by the Legislature. *Leeds v. City of Richmond*, 102 Ind. 372. This authority is one which may be rightfully exercised upon any of the highways of the municipalities of the State, for they are invested with exclusive authority over all streets and highways within their limits. It was, therefore, within the power of the city of Fort Wayne to have built the sewer in its own way, provided, of course, no injury was done the canal company. The servitude in the streets of a city is much more extensive than in rural highways, and includes the right to dig sewers, lay pipes, and the like. As there was a lawfully existing highway, the city had all the rights which the urban servitude conferred, and among them was the right to construct and maintain the sewer described in the pleadings. Where a municipal corporation has it in its power, by the exercise of ordinary care and diligence, to secure its rights and protect property-owners from an injury that will probably result from the construction of a sewer, it will be liable if the failure to do its duty results from a wrongful surrender of its authority. *City of Logansport v. Dick*, 70 Ind. 65 (36 Am. R. 166).

Another question is discussed by counsel on both sides in their argument, on the ruling upon the demurrer to the reply, and as the question is elsewhere presented in the record, rendering a decision necessary, we give it attention here, although what we have said establishes the sufficiency of the reply.

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The question to which we here refer may be thus stated: Is a municipal corporation, which makes use of private property for the purpose of constructing a sewer, and in order to obtain the privilege of using the property submits to the demand of the owner to construct the sewer according to plans and specifications prepared by him, liable for negligence in constructing or maintaining the sewer? A very careful study of the authorities has convinced us that the question must receive an affirmative answer.

It is the law that if a municipal corporation, by its system of constructing sewers, renders an outlet necessary, it must provide one. *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86); *City of Crawfordsville v. Bond*, 96 Ind. 236; *VanPelt v. City of Davenport*, 42 Iowa, 308; *Byrnes v. Cohoes*, 67 N. Y. 204.

The outlet is, therefore, a necessary part of the sewer, and if the municipal corporation enters upon the work of constructing a sewer it assumes control over the entire work, and must construct and maintain it with ordinary care and skill. This obligation extends to the entire sewer, not merely to such parts of it as are on property owned by the corporation, and it can not escape the consequences resulting from negligence by asserting that part of the sewer was constructed on private property. A municipal corporation is not bound to construct a sewer, except where its own act makes one necessary; but if it does undertake to do so, it must exercise proper care and skill in constructing and maintaining it, no matter where it may be located. *Cummins v. City of Seymour*, *supra*. As the general duty of using ordinary care and skill rests upon the municipality, it must construct and maintain its sewers where it can exercise that care and skill, and if it locates them on property where it can not control them the fault is its own, and it can not escape liability to one who has suffered injury from its negligence, because it has located a sewer where it can not control its construction or maintenance.

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nance. To permit this to be done would put it in the power of the municipality to evade liability arising from a breach of duty by locating a sewer where it could not exercise supervision over it. The only conclusion that can be maintained on principle or authority is, that the corporation is liable for negligence, no matter where it locates the sewer. It is a familiar principle that a municipal corporation may, by adoption, make itself liable for a negligent use of the property thus acquired. This principle was asserted by this court in *City of Indianapolis v. Lawyer*, 38 Ind. 348, and *City of Indianapolis v. Tute*, 39 Ind. 282, and is well supported by the authorities. In the recent case of *Kranz v. City of Baltimore*, 2 Atlantic R. 908, this doctrine was applied to a case similar to the present, and it was said: "This right of acquisition by adoption and dedication, and the consequent responsibility on the part of a municipal corporation or the public, is sustained by many well considered cases where the question has arisen." The cases of *Yates v. Judd*, 18 Wis. 126, *Houfe v. Town of Fulton*, 34 Wis. 608, and *Emery v. City of Lowell*, 104 Mass. 13, assert a like doctrine.

In *Lowrey v. City of Delphi*, 55 Ind. 250, it is held that a city was responsible for negligence in maintaining a bridge across the Wabash and Erie Canal, and the principle on which that decision rests is the same as the one which rules here. In *City of Aurora v. Colshire*, 55 Ind. 484, the rule is stated in strong terms, for it was there said: "We could not perceive how the fact that the wrong complained of was caused on the premises of another could excuse the city. The city had adopted the space and used it as a street. If the whole street had been established over private property, without authority, and used by the city, it would not have afforded the least justification, excuse, or even palliation of the wrong of which the appellee complained. * * It was sufficient that the city adopted the private wall as a part of the street,—whether rightfully or wrongfully,—to make it liable." A like doctrine was declared in *Sewell v. City of Cohoes*, 75 N.

Y. 45, and this doctrine was approved in *Veeder v. Little Falls*, 100 N. Y. 343.

It may be said here, as in the case from which we have quoted, that the city adopted the place beneath the canal as part of its sewer, and this is enough to make it responsible for negligence in constructing or maintaining that part of the sewer. . The part under the canal was as much part of the sewer as any other, and over that the city is charged with exercising ordinary care and skill.

Still another question is presented by the record and argued by counsel, which may as well be disposed of here as elsewhere, although it is more directly presented by the evidence, the instructions and the answers to interrogatories. That question is this: Is the municipal corporation liable to one who, for his private benefit, connects his premises with a sewer constructed by the corporation, for injuries resulting from the negligent construction or maintenance of the sewer? We find that the authorities settle this question against the corporation, for it is held, without diversity of opinion, that the municipality is liable in such cases. *Scemple v. City of Vicksburg*, 62 Miss. 63 (52 Am. R. 181); *Child v. City of Boston*, 4 Allen, 41; *Barton v. City of Syracuse*, 36 N. Y. 54.

The property-owners along the line of a sewer are assessed for the cost of its construction, and it is but reasonable that they should enjoy a special benefit. Indeed, the whole theory of special assessments rests on the principle that the special benefits are a compensation for the special burdens. It is but bare justice that the property-owners who have a special burden laid upon them should reap a special benefit. But another principle requires it to be affirmed that the city should be held responsible to those who tap its sewers by its invitation, for, by such an invitation, the city impliedly undertakes that it will not be guilty of negligence in maintaining the sewer. Yet another principle sustains this doctrine, and that is, that the health and comfort of the citizens require that sewers should be so maintained as that private property may

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be drained. It is true that the necessity is greater in large cities than in small, and the larger the city the plainer the principle seems; but, whether the city be large or small, if a sewer is constructed and owners of adjoining property are invited to tap it, the city impliedly declares the necessity for its existence, and announces its purpose to do its duty by using ordinary care and skill in constructing and maintaining the sewer.

The decision in *Roll v. City of Indianapolis*, *supra*, does not conflict with the views here expressed, for in that case there was an agreement that the city should be absolved from all liability, and it was on this agreement that the decision was grounded. That decision has not escaped criticism on the point here under immediate mention, and its soundness on other points has been denied. It is, indeed, doubtful whether a municipal corporation can stipulate for immunity from the consequences of a breach of duty; but, however this may be, it is quite clear that where there is, as here, no such stipulation, it can not escape the consequences of its negligence on the ground that the adjoining property-owners, acting on its invitation, tapped the sewer. *City of Logansport v. Dick*, *supra*, *vide* p. 81.

A witness was introduced by the appellees, and testified to facts showing that he was qualified to testify as an expert. The appellant asserted a right to examine him as to his qualifications before the appellees proceeded with their examination, but the court denied the request. It is for the court to determine whether the witness is or is not qualified to testify as an expert, and the question as to his competency is exclusively for the court. *Forgey v. First Nat'l Bank*, 66 Ind. 123; *McEwen v. Bigelow*, 40 Mich. 215; *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J. L. 96; *Jones v. Tucker*, 41 N. H. 546; *Flynt v. Bodenhamer*, 80 N. C. 205; *Perkins v. Stickney*, 132 Mass. 217; *Wright v. Williams*, 47 Vt. 222; *Howard v. City of Providence*, 6 R. I. 514; *Bemis v. Central Vt. R. R. Co.*, 3 Atlantic R. 531; 1 Greenl. Ev. (14 ed.), sec-

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tion 440, n.; Rogers Expert Testi. 23; Lawson Opinion Ev., 238.

Some of the cases go very far upon this point, for some of them hold that the decision of the trial court is conclusive, but we think the cases which hold that where there is no evidence at all tending to prove that the witness is qualified to testify as an expert, or where there is a palpable abuse of discretion, the ruling of the trial court is subject to review, are supported by the better reason. *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Wiggins v. Wallace*, 19 Barb. 338. But, whatever may be the true rule upon this point, it is quite clear that the court must decide the question of the qualification of the witness, and when it is made to appear *prima facie* that the witness possesses the requisite qualification the court may admit the testimony, and is not bound to allow a preliminary cross-examination. This was so expressly decided in *Sarle v. Arnold*, 7 R. I. 582. It is indeed difficult to perceive how any other conclusion could be reached when once it is granted that the court need only be satisfied that, *prima facie*, the witness is competent. Rogers Expert Testi. 50. No exact standard by which to determine the competency of the witness exists, and much is necessarily left to the discretion of the trial court. *Forgey v. First Nat'l Bank*, *supra*; *Colee v. State*, 75 Ind. 511; *Sage v. State*, 91 Ind. 141; *Goodwin v. State*, 96 Ind. 550, see p. 558; *State v. Maynes*, 61 Iowa, 119; *McEwen v. Bigelow*, *supra*; Rogers Expert Testi. 27.

If the evidence satisfies the court of the qualification of the witness, it is not bound to permit a preliminary cross-examination, though it would, no doubt, have a right to do so, and in our judgment this right is one that should be very liberally exercised. But the question which we are compelled to decide is, whether the court is bound to check the examination of the witness and allow a preliminary cross-examination, and on that question the law is with the appellees. A text-writer says: "When a witness has been adjudged com-

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petent upon the preliminary examination, opposing proof going to his incompetency is to be addressed to the jury to affect the value of his testimony, and not to the court for the purpose of excluding his testimony." Rogers Expert Testi. 50. In our own case of *Davis v. State*, 35 Ind. 496 (9 Am. R. 760), it was said of a witness, that, "Whether he is competent to testify at all as an expert, is a question for the court. But after he has been allowed to testify, the weight of his evidence is a question for the jury." It is generally held by the courts, and uniformly by ours, that the regular cross-examination may fully go into the question of the competency of the witness, and if it appear that he is not a qualified expert witness, his testimony will be weakened or entirely destroyed. *Davis v. State*, *supra*; *Goodwin v. State*, *supra*; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409. The right to a full cross-examination is thus secured, and if it turns out that the witness is not qualified the jury may be told that his opinion is of no weight; but, without such a direction, it must be presumed—as jurors are to be treated as men of fair intelligence—that the opinion of one not qualified should not be given any weight by them. *Louisville, etc., R. W. Co. v. Falvey*, *supra*; *Washington v. Cole*, 6 Ala. 212. This plenary right of cross-examination affords full opportunity to discover the extent of the qualifications of the witness, and prevents material harm to the party against whom he testifies.

The statements of the witness Ludlum, both in his examination in chief and in his cross-examination, showed that he was competent to give an opinion. He stated that he had experience in constructing work of a character similar to the appellant's sewer, and that his experience was such as enabled him to judge of the liability of timbers placed underground to decay. This was sufficient at least to carry his testimony to the jury. *House v. Fort*, 4 Blackf. 293; *City of Indianapolis v. Scott*, 72 Ind. 196; *Ferguson v. Davis Co.*, 57 Iowa, 601; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; *Hand*

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v. *Brookline*, 126 Mass. 324; *Nelson v. Wood*, 62 Ala. 175; *Sheldon v. Booth*, 50 Iowa, 209.

It is the doctrine of the authorities that study of a business without practical experience will qualify a witness as an expert. *Howard v. Great Western, etc., Co.*, 109 Mass. 384; *Swett v. Shumway*, 102 Mass. 365. It is also held that where a witness has studied an art or science he may be deemed an expert in a kindred art or science. *Barnes v. Ingalls*, 39 Ala. 193. In this instance, the witness testified that he was a civil engineer, and had knowledge of the construction of sewers, and of the materials of which they were constructed, but his testimony did not stop with this statement, for he also testified that he had a practical knowledge of sewers and culverts. There can be no doubt, therefore, that he was qualified to testify as an expert. It appears from the record that the appellant was allowed the full benefit of cross-examination, and that the cross-examination clearly developed the competency of the witness, so that if it were conceded that the court erred in denying it the privilege of a preliminary cross-examination no harm resulted, and, as is well known, a harmless error will not reverse a judgment.

The trial court permitted the appellees to prove that there was a break in the sewer about one hundred feet distant from the point where the break occurred which caused the injury for which a recovery is sought. This evidence was competent in connection with the other testimony in the case, for the purpose of charging the city with knowledge, as well as for the purpose of showing that the materials used were defective, or the work of construction was not well done, and, also, for the purpose of showing that the sewer had by reason of time and use got out of repair. *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; *Nave v. Flack*, 90 Ind. 205, see p. 214 (46 Am. R. 205); *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98); *District of Columbia v. Armes*, 107 U. S. 519, see p. 525; *Darling v. Westmoreland*, 52 N. H. 401; *Hill v. Portland, etc., R. R. Co.*, 55 Maine, 438; *City of Chi-*

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cago v. Powers, 42 Ill. 169; *Quinlan v. City of Utica*, 74 N. Y. 603; *Kent v. Lincoln*, 32 Vt. 591; *City of Augusta v. Hafers*, 61 Ga. 48; *Lanning v. Chicago, etc., R. R. Co.*, 27 N. W. R. 478.

There was no error in permitting the appellees to give in evidence the ordinance, advertisements, bids and contracts relating to the building of the sewer, for these instruments of evidence tended to prove that the sewer was constructed by the city.

It is not necessary in such a case as this for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted. It was enough to prove that the city had assumed to adopt the ordinance, and that, acting under it, the corporate authorities had constructed the sewer. It is quite clear that if the sewer was owned by the city, and was so negligently constructed or maintained as to cause injury to property, an irregularity in adopting the ordinance, or in any other part of the proceedings, would not relieve the city from liability. The controlling question in such cases as this is, not whether the city authorities have proceeded regularly, but whether they have assumed to exercise the general authority to construct sewers conferred upon the municipality, and have negligently built or maintained its sewers.

A municipal corporation is not an insurer of the condition of its sewers, but it is bound to use ordinary care and skill in constructing and maintaining them, and for a failure to exercise such care and skill is responsible to a citizen who suffers loss from such negligence. This care and skill require the municipal corporation to take notice of the liability of timbers to decay from time and use, and to take such measures as ordinary care and skill dictate to guard against a sewer becoming unsafe because of the decay of timbers used in its construction. *City of Indianapolis v. Scott*, 72 Ind. 196; *Board, etc., v. Legg*, 93 Ind. 523 (47 Am. R. 390); *Board, etc., v. Bacon*, 96 Ind. 31; *Indiana Car Company v. Parker*,

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100 Ind. 181, see p. 193; *Rapho v. Moore*, 68 Pa. St. 404; *Norristown v. Moyer*, 67 Pa. St. 355; *Todd v. Troy*, 61 N. Y. 506.

What we have said disposes of all the questions in the case, and we deem it unnecessary to notice the rulings on the instructions in detail. It is sufficient to say that those given express the law as we have here stated it, and that those refused are founded on an erroneous theory.

Judgment affirmed.

ZOLLARS, J., did not take any part in the decision of this case.

Filed June 16, 1886.

No. 11,055.

THE BELT RAILROAD AND STOCK YARD COMPANY v.
MANN.

NEGLIGENCE.—Contributory Negligence.—Wilfulness.—To entitle one to recover for an injury to which his own negligence may have contributed, the injurious act must have been purposely and intentionally committed, with a design to produce injury; or it must have been committed under such circumstances as that its natural and probable consequence would be to produce injury to others.

PRACTICE.—Verdict on Complaint Containing Bad Paragraph.—Supreme Court.—Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad the judgment will be reversed.

SAME.—Sufficiency of Complaint.—Evidence.—In determining the sufficiency of the complaint, neither the evidence nor the result reached can be considered.

SAME.—Sections 338, 376 and 658, R. S. 1881, can not be resorted to in aid of a complaint which fails to state facts sufficient to constitute a cause of action.

From the Marion Superior Court.

A. C. Harris, W. H. Calkins and E. H. Lamme, for appellant.

J. P. Baker, F. Winter and W. W. Herod, for appellee.

107	80
124	506
124	677
107	89
146	432
107	89
149	499
107	89
158	92
158	228
107	89
165	583
107	89
171	316

The Belt Railroad and Stock Yard Company v. Mann.

MITCHELL, J.—James E. Mann recovered a judgment against the appellant in the court below for damages sustained on the 25th day of June, 1882, by coming in collision with one of appellant's locomotive engines at a point where a highway crosses the Belt Railroad, near the city of Indianapolis.

The complaint is in three paragraphs. In the first and third it is charged that the plaintiff's injury was occasioned by the negligence of the railroad company, the plaintiff being without fault or negligence on his part.

The second paragraph does not aver, either directly or indirectly, that the plaintiff was without fault, but proceeds upon the theory that the injury was wilfully and purposely committed, and that the plaintiff was entitled to maintain an action against the railroad company, notwithstanding he may have been subject to the imputation of contributory fault.

With their general verdict the jury returned answers to a number of special interrogatories submitted by each of the parties. These indicate that the verdict and judgment rest on the complaint generally. Indeed, it might well be inferred, in view of the facts specially found, that the general verdict and judgment find their support in that paragraph of the complaint which authorizes a recovery without regard to the fact that the plaintiff may not have exercised due care.

Upon the assumption that the second paragraph, to which a demurrer had been overruled, charged the infliction of a wilful injury, the court, after giving the jury instructions pertinent to the other paragraphs, charged them, in substance, that if the plaintiff's injuries were the result of wilful acts on the part of the defendant's employees, then they might find for him, without reference to whether he had by his negligent conduct contributed to the injury.

The jury were further told in that connection, that if the defendant's misconduct was such as to evince an utter disregard for consequences, and to imply a willingness to inflict

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the injury suffered by the plaintiff, then they were authorized to find that the injury was wilfully inflicted.

It will thus be seen that the correctness of one of the theories upon which the case was distinctly put to the jury depends upon whether the complaint presented the issue of an injury wilfully or purposely inflicted. If there was no such issue legitimately presented, it was manifestly erroneous, and necessarily hurtful to the appellant, to permit the jury to determine its liability for an injury resulting from alleged negligence, upon the theory that the plaintiff was entitled to a verdict, notwithstanding the injury may have occurred through his contributory fault.

Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad, the judgment will be reversed. *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Lang v. Oppenheim*, 96 Ind. 47; *Caylor v. Roe*, 99 Ind. 1; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Ethel v. Batchelder*, 90 Ind. 520.

In such a case, the ruling must stand or fall upon its own merits. The evidence, or the result reached, can not be considered in determining whether the complaint was sufficient. *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Pennsylvania Co. v. Poor*, 103 Ind. 553.

We are therefore to determine whether or not the second paragraph of the complaint charges the injury to have been wilfully inflicted, and since the paragraph assumes to state the specific acts which occasioned the injury, the quality of those acts must be determined, not by considering the vituperative epithets with which the complaint abounds, but by a consideration of the acts which are charged as having caused the injury.

That part of the complaint which is material in this connection is as follows: "That on the 25th day of June, 1882, while said plaintiff was travelling along a public thoroughfare, running south from the city of Indianapolis, which crosses defendant's road just south of said city, and while

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plaintiff was crossing said road, he being seated in a two-wheeled vehicle, drawn by one horse, said defendant, by her servants and employees, ran a locomotive belonging to said defendant * * over and along said road at a great rate of speed, and said defendant so negligently and carelessly operated said locomotive, etc., as to cause the same to run into and against plaintiff's vehicle, thereby hurling said vehicle and horse to one side of the road, and running against, upon and over this plaintiff, crushing and mutilating his right arm, etc. * * * That said accident occurred, and said injuries were inflicted by said defendant, her servants and employees, through their gross and wilful negligence, and through their wantonness and recklessness in the management of said locomotive and train. Plaintiff avers that by reason thereof he was cruelly, wantonly, and wilfully, permanently maimed and injured by said defendant's said employees, to his great and irreparable damage," etc.

Conceding that an action can not be maintained for an injury occasioned by "simple negligence," unless the plaintiff was himself without fault, the appellee contends that the paragraph in question exhibits a case of wilful misconduct, and that it was therefore sufficient on demurrer.

The aid of sections 338, 376 and 658 of the code is invoked in support of this contention. These sections provide, in substance, that the complaint shall contain a statement of the cause of action in plain and concise language, so as to enable a person of common understanding to know what was intended. That in the construction of a pleading, its allegations shall be liberally construed with a view to substantial justice between the parties. Further, that no judgment shall be reversed for any defect in form, variance or imperfections contained in the record, etc.

The foregoing sections have often been resorted to, but without success, in aid of complaints which failed to state facts sufficient to constitute a cause of action. Where a demurrer to a complaint which fails to state a cause of action

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has been overruled, the error in so ruling can not be cured by resorting to the sections relied on. The reasons have been so often stated that to state them again would serve no useful purpose. *Johnson v. Breedlove*, 72 Ind. 368, and cases cited; *Sims v. City of Frankfort*, 79 Ind. 446; *Weir v. State, ex rel.*, 96 Ind. 311, and cases cited.

The use of the phrase "wilful negligence," in the connection in which it is frequently employed, is, to say the least, inapt. Whatever idea the word "wilful" may express when so used, it is beyond question that to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct, *quasi* criminal in character. Following recent and well considered decisions of this court, we arrived at the conclusion in *Louisville, etc., R. W. Co. v. Bryan, ante*, p. 51, that to constitute a wilful injury the act or omission which produced it must have been purposed and intentional, or must have been committed under such circumstances as evinced a reckless disregard for the safety of others.

Where one is injured at a railroad crossing by coming in collision with a train, an inference of negligence arises, and unless this inference is rebutted by a general averment of due care, or a specific statement of the facts, showing due care, or unless it appears that the injury was intentionally committed, the complaint is not sufficient. *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31.

There is no language in the paragraph under consideration which can be said to charge that the appellant's employees had an intent, either actual or constructive, to commit the injuries complained of. It does not appear that they had

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knowledge of the plaintiff's presence in time to have avoided the collision, or that the crossing was of such a character as that the natural and probable consequence of running an engine, in the manner described, would be to produce an injury such as that suffered by the plaintiff.

The demurrer to the second paragraph of the complaint should have been sustained.

Some of the instructions given, and some of those refused, are the subjects of discussion. We are also asked to consider the answers to the special interrogatories returned by the jury. As, however, it is apparent from what has already been said, that one theory upon which the case was tried was erroneous, we deem it more consistent with the rights of both parties that a new trial should be ordered without embarrassing the case with any suggestions in respect to the other questions discussed.

For the error in overruling the demurrer to the second paragraph of the complaint the judgment is reversed, with costs.

Filed June 17, 1886.

No. 12,429.

LONG, EXECUTRIX, v. STRAUS ET AL.

CONTRACT.—*Receipt for Money Deposited.*—*Statute of Limitations.*—An instrument reading, "Received of Joseph S. Long sixteen hundred dollars, on deposit, in National currency. Straus Bros.," is a written contract for the payment of money, and the six years' statute of limitations does not apply to an action thereon.

From the Noble Circuit Court.

D. W. Green, F. P. Bothwell, H. G. Zimmerman and N. Prentice, for appellant.

J. I. Best, J. H. Baker and F. E. Baker, for appellees.

107	94
124	84
127	214
127	264
107	94
128	245
107	94
128	134
107	94
145	632
107	94
157	140
107	94
159	258
159	343
107	94
165	164

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ELLIOTT, J.—The instrument upon which this action is founded reads thus:

“Received of Joseph S. Long sixteen hundred dollars, on deposit, in National currency. STRAUS BROS.

“LIGONIER, April 27th, 1865.”

This instrument is more than a mere receipt, for it embodies an agreement. The terms of the agreement are not, it is true, expressly stated in the instrument, but they are clearly implied in the language employed by the parties. The law is a silent factor in every contract, and it is a factor in this one. *Foulks v. Falls*, 91 Ind. 315, see p. 320. There are, indeed, very few contracts that would be intelligible if they were considered as destitute of the legal element, for the law gives vitality and force to all contracts, and makes them intelligible and enforceable. Men are presumed to contract with reference to the law, and to employ language that has a legal meaning, and to which the courts may give just effect.

In the instrument before us the parties have employed words that have a definite legal meaning, and the courts can not treat as meaningless any of the words which the parties have employed, for the long settled rule is, that no word shall be disregarded unless the contract clearly demands it. There is no such demand here, as there is entire harmony in all the parts of the instrument. It plainly declares that the signers of the instrument have received on deposit sixteen hundred dollars of the payee's money. The words “on deposit” import a contract, and the context shows that the money received by the persons with whom it was deposited was that of the depositor. The instrument would not, in legal contemplation, have been one whit clearer if the parties had stated at full length all the details of their agreement. The language used creates a contract, and the law implies, as part of the contract, that on reasonable demand the depositor is entitled to receive back that which belongs to him. The deposit of money is a transaction well known to the law, and it is one out of which well defined legal rights emerge; chief

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among these rights is that of the depositor to receive his own again, and a correlative of this right is the implied promise of the person who receives money on deposit to return it to the depositor. It needs no express words to create this obligation to return the money; the law makes it an attribute of the contract. It would shock every one's sense of justice to affirm that a depositor could not get back his money unless there is an express promise to return it to him, but this can not be affirmed without doing violence to the settled principles of jurisprudence. In affirming, as we do, that the law enters into every contract unless expressly excluded, we do no more than restate one among the oldest rules in the law of contracts. "Every agreement and promise," says Mr. Pollock, "enforceable by law is a contract." Pollock Prin. of Cont. 1.

We have here an agreement enforceable by law, and, therefore, a contract. The promise of the signers is, to be sure, an implied one, but it is none the less a legal promise, involved in the language employed by the contracting parties. To deny that the law will, where justice requires it, imply a promise that may be enforced, would be to dispute a doctrine that runs back to the earliest years of the common law, and, surely, there can be no case where justice more imperatively requires that such a promise should be implied than one where money is received on deposit, for it is inconceivable that the person so receiving money should be under no obligation to return or repay it to the depositor. The promise here, however, is part of the contract itself, for to the language used in the instrument the law affixes a definite meaning. If there were no adjudged cases we should have no hesitation in deciding on principle that the instrument set forth in the complaint is a contract for the payment of money, but there are decisions which very fully sustain this conclusion. In *Payne v. Gardiner*, 29 N. Y. 146, the question was thoroughly discussed, and an instrument in all material aspects the same as the one here under discussion was held to be a contract of

bailment. The instrument under examination in *Tisloe v. Graeter*, 1 Blackf. 353, was in legal effect the same as the one before us, the only difference in the phraseology of the two instruments being, that the one in the case cited used the words for "safe-keeping," while the one we are dealing with uses the words "on deposit," and it was held that the instrument constituted a contract which could not be varied by parol evidence. A like ruling upon a very similar instrument was made in *Dale v. Evans*, 14 Ind. 288. Upon the same general principle was decided the case of *Foulks v. Falls*, *supra*, where it was held that an instrument in form a receipt, but containing a recital that the note described was received for collection, was a written contract. These cases, to which many more might be added, establish the doctrine that such an instrument as the one declared on constitutes a contract, and if it is a contract it can be none other than a written contract. It is not the less a written contract because the law annexes to it certain attributes, for this the law does to every contract. In proof of the validity of our conclusion we need adduce only one instance, that of a promissory note, to which the law annexes three days of grace, and yet we suppose no one would dream of affirming that a promissory note was not a written contract.

Assuming, as we have no hesitation in affirming that the authorities cited and the principles referred to entitle us to do, that the instrument executed by the appellees is a written contract, all that remains is to ascertain its character, and this the authorities enable us to do without difficulty. It is a written acknowledgment of the receipt of money, and a promise to repay it on reasonable demand. Daniel Negotiable Inst., section 37. "Money on deposit," says the Court of Appeals of New York, "means, *ex vi termini*, money placed where the owner can command it at any time." *Curtis v. Leuwitt*, 15 N. Y. 9, see p. 265. It is the money of the depositor, due him on a written contract, for the law affixes to

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the words "on deposit" such a meaning as makes the contract perfect and complete. 1 Story Cont., section 16; Pomeroy Cont., section 155; Story Bailments, section 88; *Payne v. Gardiner*, *supra*.

It may, perhaps, be true that the instrument signed by the appellees is not just what is known in the commercial world as a certificate of deposit, but it is nevertheless a contract in writing, evidencing the receipt of money on deposit, and to it all the legal incidents attach. If it is a contract, and an enforceable one, then this action is well brought, and that it is such a contract we have no doubt.

Appellees' counsel refer us to the cases of *Harmon v. James*, 7 Ind. 263, *Johnston v. Griest*, 85 Ind. 503, and *Caviness v. Rushton*, 101 Ind. 500 (51 Am. R. 759), but there is slight, if, indeed, any similarity between those cases and the present. It is sufficient to note one of the important points of difference, and that is this, here the instrument shows on its face full consideration for the promise, while in those cases no valuable consideration was shown for the promise, for this instrument discloses that the money received on deposit belonged to the person to whom the instrument was executed.

Our conclusion is that the instrument declared on is a written contract for the payment of money, and that the complaint is sufficient.

The plea of the six years' statute of limitations is bad, and the court erred in overruling the appellant's demurrer to it. We do not deem it necessary to further discuss the question, for, in deciding that the contract is a written one, we necessarily decide that the action is not barred by the six years' statute.

Judgment reversed.

MITCHELL, J., did not participate in the decision of this case.

Filed March 31, 1886.

Long, Executrix, v. Straus *et al.*

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The instrument declared on is a contract. It is a written contract. It can not be contradicted or varied by parol evidence. The law enters into it as a silent factor, and the obligation implied by law from the language employed is as much part of the contract as though what the law implies had been fully expressed in words.

Where there is an express contract there can be no implied one. An express written contract contains the only competent evidence of the agreement of the parties. There is here an express written contract, and, therefore, there is no implied one. But this written contract is to be given legal effect, and to give it effect the courts must consider it as embodying all the legal obligations implied from its language. These obligations, we repeat, are part of the written contract. The law imported into the contract does not create an independent agreement, but makes the instrument express the full agreement of the parties.

All the words found in a contract are to have a meaning attributed to them, and are not to be thrust aside. We can not, therefore, disregard the words found in the contract before us, "on deposit, in National currency." We know that the words "National currency" denote money, and we know, therefore, that those words, taken in connection with the words "on deposit," mean that the appellees had received a deposit in money from the appellant's testator. *Phelps v. Town*, 14 Mich. 373. We know, also, that the law as a factor is an essential part of the contract, and it seems very plain to us that the express agreement of the parties, considered in conjunction with this factor, imports a contract to repay the deposit on demand. Suppose the appellees to have attempted to show by parol that they were not to repay this money, would not the attempt be defeated by the proposition that such a contract can not be varied by parol evidence? Of this there can be no doubt. *Tisloe v. Graeter*,

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1 Blackf. 353; *Hull v. Butler*, 7 Ind. 267; *Jones v. Clark*, 9 Ind. 341; *Pribble v. Kent*, 10 Ind. 325, *vide* p. 328; *Henry v. Henry*, 11 Ind. 236; *McKernan v. Mathew*, 21 Ind. 291; *Foulks v. Falls*, 91 Ind. 315.

All contracts have imported into them legal principles which can no more be varied by parol evidence than the strongest and clearest express stipulations. We have already given one example, that of the days of grace added by force of law to a promissory note. A more striking example, perhaps, is that supplied by the contract of endorsement, for, in such cases, although not a word more than the name of the endorser is written, the contract which the law implies can not be varied by parol. The authorities all agree that the regular endorsement of a promissory note is as perfect a contract as though the liability which the law implies were written out in full. *Smythe v. Scott*, 106 Ind. 245. In contracts under seal, as deeds, leases, and the like, covenants are engrafted into the agreement of the parties by operation of law, and, indeed, into every conceivable contract the law enters as an essential element. Into the contract before us the law enters and makes it an agreement to repay the money received on deposit. As the contract is a written one, not subject to variation by parol evidence, the agreement to repay the money must exist in it or not exist at all, and surely no just man would assert that one who receives money on deposit, and so states in a written contract, does not undertake to repay it. If he undertakes at all he does so by his written contract, for there is and there can be no other contract, as all oral negotiations and stipulations are merged in the writing. That, and that alone, expresses the agreement of the parties. *Oiler v. Gard*, 23 Ind. 212; *Cincinnati, etc., R. R. Co. v. Pearce*, 28 Ind. 502, *vide* p. 506. The law implies a promise to pay the depositor his money, and where there is a written contract the law conducts this implied promise into the contract as one of its elements, so that the entire contract is a written one. Where there is an effective written contract there can

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be no verbal one. *Board, etc., v. Shipley*, 77 Ind. 553; *Pulse v. Miller*, 81 Ind. 190. As there is here a written contract into which the law imports a promise to pay, the statute of limitations governing written contracts to pay money is the only one that applies. We thus find that, reasoning on elementary principles, the conclusion must be that the contract is a written one for the payment of money.

Our conclusion reaches further than that there is an implied promise to pay the depositor his money, for it goes to the extent of affirming that this promise is created by law as an element of the contract, and as such enters into and forms part of the written agreement. We do not regard the promise as an independent one, existing outside of the written contract, but as a promise forming one of the terms of the contract. In short, we look upon it as a part of the contract, put there by law, for the parties are presumed to have contracted with reference to the law. The principle on which we proceed is thus stated by Mr. Bishop: "What is implied in an express contract is as much a part of it as what is expressed." Bishop *Cont.*, section 121. On this subject the Supreme Court of the United States said: "Undoubtedly necessary implication is as much part of an instrument as if that which is so implied was plainly expressed." *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, *vide*, p. 288.

We maintained in our former opinion, as we maintain here, that the law implies a promise to pay back to the depositor his money, and that where there is a written contract stipulating that money has been received on deposit, that promise is an essential part of the written contract itself. It is a promise in the written instrument, and not outside of it. "The acknowledgment of indebtedness on its face implies a promise to pay to the plaintiffs," said the court in *Kimball v. Huntington*, 10 Wend. 675. So we say here, an acknowledgment that the money was received on deposit implies a promise to pay it to the depositor, and we hold, as was held in the case cited,

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that this promise is implied by law as an obligation arising from the language of the contract, thus forming one of its terms. As there is an express contract, and as the promise forms part of the contract, it is a contract for the payment of money or else it is no contract at all. Once it is granted that the promise to pay back the depositor his money is created by law, then it follows with absolute logical certainty that the promise is as much part of the written instrument as though it were written therein in express words.

The authorities which bear most directly upon the question lead to the conclusion at which we have arrived. We find an able court saying: "Money on deposit means, *ex vi termini*, money placed where the owner can command it at any time." *Curtis v. Leavitt*, 15 N. Y. 9, *vide* p. 265. In giving effect to an instrument similar in all material respects to the one before us, that court in a very recent case said: "Being a deposit a demand of the money was essential to a right of action, unless there was a wrongful conversion or loss by some gross negligence on the part of the depository. The distinction between a deposit and a loan is considered in *Payne v. Gardiner*, 29 N. Y. 146, and within the rule there laid down the instrument in question was a certificate of deposit." *Smiley v. Fry*, 100 N. Y. 262. We referred to *Smiley v. Fry*, as declaring such an instrument to be in the nature of a certificate of deposit, and in this we are, as the quotation we have made shows, sustained by the latest expression upon the question. At another place in the opinion from which we have quoted it is said: "As the instrument in question was not a promissory note but a certificate of deposit, the defence of the statute of limitations, interposed by the defendant, was not available." It is perhaps true that the decision in *Hotchkiss v. Mosher*, 48 N. Y. 478, is in conflict with the views we have expressed, for it holds, as we understand it, that a certificate of deposit may be contradicted by parol evidence, as the court says: "We are of the opinion that parol evidence was admissible to explain the certificate in the same manner

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as in the case of a receipt." This ruling is in conflict with our own cases and with the cases in New York and elsewhere, and can not be accepted as the law. The case is not a well considered one, for no authorities are cited in support of the conclusion announced. It is held by many courts, including our own, that an order for property, accompanied by a direction to charge its value to an owner, is a written contract, containing a promise to pay its value. *Garmire v. State*, 104 Ind. 444; *United States v. Book*, 2 Cranch C. C. 294; *United States v. Brown*, 3 Cranch C. C. 268; *State v. Morgan*, 35 La. Ann. 293; *State v. Ferguson*, 35 La. Ann. 1042; *Anderson v. State*, 65 Ala. 553; *Burke v. State*, 66 Ga. 157; *Peete v. State*, 2 Lea, 513; *State v. Keeter*, 80 N. C. 472; *People v. Shaw*, 5 Johns. 236; *Commonwealth v. Fisher*, 17 Mass. 46.

The principle which these cases declare is the same as that here involved, for the principle on which they proceed is that the law imports into the order a promise to pay, and that is true of such an instrument as the one now before us. In the case of *White v. President, etc.*, 22 Pick. 181, the instrument read thus: "Dr. Franklin Bank in account with B. F. White, Cr. 1837, Feb. 10th. To cash deposited, \$2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier." And this was held to be a promise to pay money at a future day.

In our original opinion we said that the instrument signed by the appellees may not be "just what is known in the commercial world as a certificate of deposit, but it is nevertheless a contract in writing evidencing the receipt of money on deposit, to which all the legal incidents attach." It is by no means certain whether it is not a regular certificate of deposit. It is said by a legal author, in speaking of certificates of deposit, that, "Usually they embody an express promise, in terms, to pay; but even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are nearly of the same effect as if they expressly promised payment.

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Substantially, therefore, they resemble promissory notes, and the courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. But this is not a necessary feature. If they are payable at a future day certain, they are simply promissory notes, neither more nor less." *Morse Banking*, 63.

Our cases, in accordance with the very great weight of authority, hold that a certificate of deposit, written in full and regular form, is a promissory note, and as such negotiable. *Gregg v. Union, etc., Bank*, 87 Ind. 238; *Brown v. McElroy*, 52 Ind. 404; *National, etc., Bank v. Ringel*, 51 Ind. 393; *Drake v. Markle*, 21 Ind. 433.

If the instrument we have under consideration had been written out in full, although payable on demand, it would be a promissory note, and it seems, under the principles we have stated, that it is a promissory note, and as such negotiable, for it is well settled that no precise form of words is necessary to constitute a promissory note, as any form that expresses a promise, although not in direct terms, will be sufficient. Thus, a written statement that a designated sum is due a person named, or a certificate that a specified sum is due a person designated, or a mere general statement that a certain amount is due, is considered a promissory note, and yet in none of these instances is there an express promise to pay. *Russell v. Whipple*, 2 Cowen, 536; *Franklin v. March*, 6 N. H. 364; *Cummings v. Freeman*, 2 Humph. 142; *Brewer v. Brewer*, 6 Ga. 587, *vide*, p. 589; *Hussey v. Winslow*, 59 Maine, 170; *Knight v. Connecticut, etc., Co.*, 44 Vt. 472; *Fleming v. Burge*, 6 Ala. 373; *Draher v. Schrieber*, 15 Mo. 602; *Marrigan v. Page*, 4 Humph. 244.

There are two well considered cases applying the principle declared in these cases to certificates similar in all essential respects to the one here declared on. *Lynch v. Goldsmith*, 64 Ga. 42; *Hart v. Life Association*, 54 Ala. 495. In the case

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last cited the instrument read thus: "This certifies that the Life Association of the South has on deposit with me the sum of \$1,723.45 in currency. H. C. Hart, President and Treasurer, local board of trustees."

Whether the instrument declared on is or is not negotiable, is not here an important question, and we need not, and do not decide it, for all that the record requires us to decide is that it is a contract, a written contract, and a contract for the payment of money. The character of the instrument as to negotiability does not affect the question before us, for, as Mr. Morse says, "A certificate of deposit may or may not be made negotiable." Morse Banking, 65.

The authorities we have cited sustain our decision, and it rests on the elementary principle we have expressed in language borrowed from Mr. Bishop. Indeed, we do no more than apply to the contract before us the rule declared in *Foulks v. Falls*, *supra*, where it was said: "This agreement being implied by the law as a part of the written contract, the averment of it in the complaint, or the proof of it by oral testimony, added nothing to the contract or to the responsibility of the appellant. 2 Parsons Con., pp. 54, 515; *Reilly v. Cavanaugh*, 29 Ind. 435; *Weeks Attorneys*, section 259; *Walpole v. Carlisle*, 32 Ind. 415; *Skillen v. Wallace*, 36 Ind. 319; *Hillegass v. Bender*, 78 Ind. 225." *Falmouth, etc., T. P. Co. v. Shawhan*, *ante*, p. 47.

If the appellees had inserted the words in this contract, "we promise to pay back the depositor his money," it would not have added to the legal force and effect of their contract, for what the law implies is in it as it is written.

Petition overruled.

Filed June 19, 1886.

Powell v. The City of Madison *et al.*

No. 13,109.

POWELL v. THE CITY OF MADISON ET AL.

MUNICIPAL CORPORATION.—*Indebtedness.—Constitutional Limit.—Funding Bonds.*—Article 13 of the State Constitution, adopted March 14th, 1881, prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding two per centum on the value of their taxable property, and providing that all obligations in excess of such amount shall be void, is only prospective in its operation, and will not prevent such corporations from issuing new bonds, with coupons for future interest, for the purpose of funding debts, with accrued interest, existing prior to the adoption of such amendment.

SAME.—*Effect of Constitutional Amendment Limiting Indebtedness.*—The only effect which the adoption of such constitutional amendment had upon sections 3230 and 3231, R. S. 1881, which provide for the funding of the indebtedness of cities and towns, was to limit their application to debts contracted prior to March 14th, 1881, and to such as have been since incurred, not in excess of the two per centum limit upon the value of their taxable property.

From the Jefferson Circuit Court.

J. McGregor, E. G. Leland and S. E. Leland, for appellant.

C. A. Korbly, W. O. Ford, P. E. Bear, C. E. Walker and J. L. Wilson, for appellees.

NIBLACK, J.—This was a suit for an injunction. The complaint was as follows:

Edward E. Powell, on behalf of himself and others who are citizens of the city of Madison, in the county of Jefferson, in the State of Indiana, and taxpayers to said city, but whose names are too numerous to mention, plaintiff, for substituted complaint in said cause, complains of the city of Madison, a municipal corporation, situated in said county and State, and incorporated under the general laws of said State, for the incorporation of cities, and Joseph T. Brashear, the mayor of said city, and John A. Zuck, the clerk of said city, defendants, and says that he, the plaintiff, is a resident citizen of said city and a taxpayer to said city, and that said defendant, city of Madison, was, on the 14th day of March, 1881, and long prior thereto, such municipal corporation.

107	108
133	114
107	108
145	434
146	474

107	108
152	223
107	108
155	171

That at said time, to wit, March 14th, 1881, the said city of Madison was indebted in the sum of two hundred and thirty thousand dollars, and that the value of the taxable property within said city as valued in the assessment for State and county taxes for the year 1880, which was the last assessment for the State and county taxes previous to said time, to wit, March 14th, 1881, was three million, three hundred and two thousand, eight hundred and fifty dollars, and that said indebtedness was largely in excess of two per centum of the said valuation of the said taxable property within said city, and was almost seven per centum of the said valuation of said property. That said indebtedness of said city was, on March 14th, 1881, evidenced by the negotiable bonds of said city, and the notes or orders of said city, to wit, the sum of one hundred thousand dollars in the negotiable bonds of said city, known as the "Water-Works bonds," which bore interest at eight per centum per annum, and mature August 1st, 1892, and the further sum of one hundred and thirty thousand dollars in the notes or orders of said city, and which matured at different times, and bore interest at six per centum per annum. That of the said indebtedness of one hundred and thirty thousand dollars, consisting of the notes or orders of said city, and so existing on March 14th, 1881, only six thousand eight hundred and seventy-one dollars and eighteen cents remain unpaid or not renewed; that the residue of said debt has been paid or renewed from time to time since March 14th, 1881, by the issue of new notes or orders of said city, and in many cases with accumulated interest, which could not be paid by the city out of its revenues after paying the necessary expenses of the city government, and lighting the city, for street repairs, schools, etc., until now the debt of said city, evidenced by such notes or orders, is the sum of one hundred and forty-one thousand, nine hundred and eighty-seven dollars and forty-three cents, which sum is in excess of the said sum of one hundred and thirty thousand dollars more than eleven thousand dollars, and that the said indebt-

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edness of one hundred and forty-one thousand nine hundred and eighty-seven dollars and forty-three cents, so evidenced by the notes or orders of said city draws interest at six per centum per annum. That, on the 4th day of March, 1886, the said city was indebted in the sum of two hundred and forty-one thousand dollars or more, which debt consisted of said one hundred thousand dollars "Water-Works bonds," which were still outstanding and unpaid, and the further sum of one hundred and forty-one thousand dollars or more, of the notes or orders of said city, and that the whole of said indebtedness is still outstanding and unpaid, and that the value of the taxable property within said city as valued in the assessment for State and county purposes for the year 1885, is three million, three hundred and thirty-seven thousand and two hundred and twenty-five dollars, and which is the last assessment made for State and county purposes, and that said indebtedness of said city is now greatly in excess of two per centum of the said valuation of the said taxable property within said city, and is more than seven per centum of the said valuation of said property.

The plaintiff further says that for the alleged purpose of funding the sum of one hundred and four thousand dollars of said indebtedness of said city in the four per centum negotiable bonds of said city, payable eight thousand dollars each year for a period of thirteen years, commencing two years from date, to bear interest at four per centum per annum, payable semi-annually, principal and interest, at the National Branch Bank in said city, and called the "Funding Bonds of the City of Madison," the common council of said city did, on the 4th day of March, 1886, pass the preamble and ordinance which read as follows, to wit:

"AN ORDINANCE

"Adopted by the common council of the city of Madison, State of Indiana, to fund a portion of the indebtedness of said

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city, under section 3230, Revised Statutes 1881, enrolled March 4th, 1886.

“WHEREAS, Said city of Madison has a voting population of less than sixteen thousand, as shown by the votes cast for governor at the last preceding election, and having an indebtedness evidenced by the bonds, notes, and other obligations of said city, exceeding \$104,000, which debt is drawing a rate of interest of six per cent. per annum, and some of it a greater rate of annual interest, and,

“WHEREAS, Said city had not the present means for payment of said debt or any considerable part thereof, without the levy of most oppressive taxes, and,

“WHEREAS, On, and ever since the 14th day of March, 1881, said city has been and is now indebted by her bonds, notes and other obligations in an amount greatly exceeding two per cent. on the amount of her taxable property, as shown each year since 1881 by the assessment of taxable property of said city for State and county purposes for the last and each preceding year of said period, and,

“WHEREAS, Many of said outstanding city bonds, notes and other city obligations of debt have been renewed by the like city evidences of debt, because of the inability of the city to pay the same, and,

“WHEREAS, We, the common council of said city, believe it will be for the best interest of the city, and taxpayers, to fund one hundred and four thousand dollars (\$104,000) of said indebtedness into 4 per cent. city bonds, payable within fifteen years in equal annual instalments, at the National Branch Bank of Madison, in said city, bearing interest payable semi-annually. Said bonds to be of the denominations of \$50, \$100, \$500 and \$1,000 each, and to be exchanged for the said outstanding city bonds, notes and other obligations, representing city indebtedness prior to March 14th, 1881, at par, therefore,

“*Be it ordained by the common council of the city of Madison, by a vote of more than two-thirds of her said common coun-*

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cil, to wit, by a vote of eleven of the twelve members of said common council, that said city will, for the purpose of funding her said debt aforesaid, issue her bonds, under her seal, signed by her mayor and city clerk, for said sum of one hundred and four thousand dollars (\$104,000), payable \$8,000 each year for a period of thirteen years, commencing two years after date, to bear interest at 4 per cent. per annum, the interest payable semi-annually, principal and interest payable at the National Branch Bank of Madison, in said city; said bonds to be of the denominations of \$50, \$100, \$500 and \$1,000 each, and called 'Funding Bonds of the City of Madison,' with interest warrants attached, to be used in exchange for bonds, notes and obligations of said city outstanding prior to March 14th, 1881, and renewals thereof, and for no other purpose, only when parties holding such debts against said city, drawing a greater rate of interest than four per cent., refuse to take these funding bonds in exchange, then the city may sell in the market, of said bonds at par, a sum sufficient to pay off and discharge said debts.

"SECTION 2. Be it further ordained that said common council shall levy a tax each year for fifteen years upon the taxables of said city, to pay the annual interest on said bonds, and the annual payments of principal thereof of \$8,000 two years after date, and \$8,000 per year thereafter.

"SECTION 3. This ordinance shall take effect and be in force from and after its passage and legal publication.

"By order, • JOS. T. BRASHEAR, Mayor.

"JOHN A. ZUCK, Clerk."

The plaintiff says that there is no money in the treasury of said city, and that the revenues of said city from all sources are not sufficient to pay all of the annual expenses of said city, necessarily incurred in carrying on the city government, and the interest on her said debt, and that the debt of said city is increasing by the non-payment of interest as it matures, or in borrowing other money to pay such interest. That the issue and sale, or negotiation or exchange, of said

bonds by the said city will greatly increase the debt of the said city, and that the revenues of said city from all sources will not be sufficient after paying the necessary expenses of carrying on the city government of said city, to pay the interest on the said bonds, as the said interest shall accrue from year to year. That said city and her officers have provided no revenue with which to pay said bonds or interest thereon. That there has been no levy or assessment of taxes within said city, of her taxable property, ordered or placed on the assessor's book or tax-duplicate of said city for the purpose of raising said fund with which to pay said bonds or interest.

The plaintiff says that said city had no legal right to pass said preamble and resolution or ordinance, and has no right or authority to issue the bonds therein provided for, or exchange the same. And that unless the said defendants, the said city and her said officers, are restrained, the said bonds will be issued and put upon the market and sold, greatly to the injury and damage of the plaintiff and the taxpayers of said city generally, and that the said officers of said city are threatening to and about to issue said bonds and put the same upon the market in accordance with the provisions of said ordinance.

Wherefore the plaintiff prays the court that said city and her said officers be, on the final hearing of this cause, perpetually enjoined and restrained from issuing the said bonds, or any part of them, or in any manner borrowing money or creating a debt under and by virtue of said ordinance, and for all relief proper in the premises.

This complaint was held to be sufficient upon demurrer.

The defendants then answered, admitting the debt of the city of Madison to have been, on the 14th day of March, 1881, as stated in the complaint, and that the value of the taxable property of said city was on that day, and is now, as alleged by the plaintiff; also, admitting that the plaintiff is a resident citizen and taxpayer of the city in question; also, further admitting that the common council of said city did,

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on the 4th day of March, 1886, by a vote of eleven of the twelve members of that body, pass the ordinance set out in the complaint, and that said city intended to issue its bonds and to fund its debt, as provided by such ordinance, unless lawfully restrained from so doing. But the answer averred that said city does not propose to make use of, or to appropriate any of such bonds, or any of the proceeds of such bonds which may be sold, for the purpose of paying or extinguishing any part of its indebtedness contracted since the 14th day of March, 1881, but solely and only to exchange such bonds for, or to use their proceeds in payment of, the bonds and obligations of such city outstanding for debts incurred before that date. Said answer further averred that said city can not by any taxes it is authorized to levy, and other sources of revenue, pay off and take up any part of the debt of \$104,000, mentioned in the complaint, before or at the time of its maturity, wherefore it has become desirable to fund such indebtedness by the issuing of new bonds; also, that the indebtedness proposed to be funded bears interest at the rate of six per cent. per annum, and some of it at a still greater rate of interest.

The defendants, still further answering, offered to consent that judgment might be rendered enjoining the city and its officers from using any of the new bonds proposed to be issued, or their proceeds, for the payment of any debt contracted since the 14th day of March, 1881.

The plaintiff demurred to this answer, and his demurrer being overruled, and he declining to plead further, final judgment went against him upon demurrer.

The plaintiff, as the appellant here, complains of the overruling of his demurrer to the answer, and cross error is assigned upon the refusal of the circuit court to sustain the demurrer of the appellees to the complaint.

Two sections of the statutes having relation to the government of cities, known as sections 3230 and 3231 of the

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Revised Statutes of that year, went into effect on the 7th day of March, 1881, and are in these words:

"3230. Any city or town in this State, having a voting population of less than sixteen thousand, as shown by the votes cast for governor at the last preceding election, and having an indebtedness evidenced by bonds, notes, or other obligations heretofore issued or negotiated by such city or town, may, for the purpose of funding such indebtedness, or any part thereof, and reducing the rate of interest thereon, and cancelling so much thereof as may be due or shall hereafter become due, upon the vote of two-thirds of the members of the common council of such city or the board of trustees of such town, issue its bonds, with interest coupons attached, for an amount not exceeding, in the aggregate, the whole amount of the indebtedness of such city or town; which bonds may be of any denomination not less than fifty dollars, nor more than one thousand dollars, and shall be payable at any place, after two years, in equal annual instalments, not exceeding in all the period of fifteen years, and shall bear any rate of interest not exceeding six per cent. per annum, payable semi-annually; and such city or town may negotiate such bonds at any market or place at not less than par.

"3231. The common council of such city or the board of trustees of such town shall add to the tax-duplicate thereof, annually, a levy sufficient to pay the yearly interest on said bonds and to provide a sinking fund for the liquidation of the principal thereof, as they become due; which sinking fund, together with all interest, increase, or profit thereon, shall be applied to the payment of said bonds and to no other purpose."

On the 14th day of March, 1881, the following amendment to the Constitution, known now as Article 13 of that instrument, was adopted: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate

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exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness ; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void : *Provided*, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property-owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defence to such an amount as may be requested in such petition."

This suit was instituted, and this appeal is prosecuted, upon the theory that the adoption of the constitutional amendment, above set out, so far modified sections 3230 and 3231 of the statutes of 1881, previously herein also set out, as to prohibit cities and towns from issuing new bonds, and in that way funding their debts, whenever their aggregate indebtedness exceeds two per cent. of the value of their taxable property respectively, and in support of that theory it is argued that the issuance of new bonds in a form different from older outstanding obligations, no matter for what purpose, is, in a sense, the creation of a new debt, and that such is the case in its fullest sense, where new bonds are issued to provide for the payment of interest already due, or where coupons are attached for the payment of future interest when it shall become due.

The issuing of new bonds to provide, at their par value, for the payment of an old debt, or the substitution of new evidences of a pre-existing debt, is not, in any legal or proper sense, the creation of a new indebtedness. Nor is the funding of interest already due, or the execution of coupons for the payment of interest which will thereafter accrue upon a pre-existing indebtedness, either the creation of a new debt, or, in legal contemplation, an increase of such pre-existing indebtedness. Interest is the premium allowed by law for the use of money. *Gaar v. Louisville Banking Co.*, 11 Bush,

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180 (21 Am. R. 209). It is accessory, or incident only, to the principal debt upon which it accrues. The principal is a fixed sum, and the interest, as the accessory or incident, is necessarily an accruing one. The obligation to pay interest is, in many instances, imposed by law, and, whether so imposed, or resulting from a special contract, such an obligation becomes an incidental part of the contract for the payment of the principal sum, and continues to run until such principal sum is fully paid, or such contract is otherwise discharged, the principal sum being in all cases the basis upon which accruing interest rests. After interest has accrued, the parties may, by agreement, change its character to that of principal, and then interest upon the amount so transformed may commence to run. See Abbott Law Dictionary, Title "Interest"; also sections 5199 and 5200, R. S. 1881.

Section 10 of the Constitution of the United States declares, amongst other things, that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts. This limitation upon the power of a State is as restrictive upon its action through its organic law as it is upon the character of the statutes which its Legislature may enact. *Railroad Co. v. McClure*, 10 Wall. 511; *County of Moultrie v. Rockingham Ten-Cent Savings Bank*, 92 U. S. 631.

The constitutional amendment in question could not, therefore, have, and, for that reason, did not have, any retrospective effect upon the existing indebtedness of municipal corporations at the time of its adoption. For the same reason it did not impair, and was, presumably, not intended to impair, the obligation of any of the contracts into which municipal corporations had already entered, whether for the payment of a principal sum of money or of interest which had accrued, or might thereafter accrue thereon. *Scott v. City of Davenport*, 34 Iowa, 208.

Its operation was only prospective. Where the limit of a two per centum indebtedness had already been reached, it prohibited the contracting of any new or further indebted-

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ness; and where that limit had not been reached, it simply restrained municipal corporations from incurring new debts in excess of such limit. Consequently, the only effect which the adoption of the constitutional amendment now before us had upon the sections of the statute under consideration, was to limit their application to the indebtedness of a city or town which had been contracted prior to the 14th day of March, 1881, and to such as has been since incurred, not in excess of the two per centum limit upon the value of its taxable property.

As the ordinance, set out in the complaint, proposes to fund only indebtedness which had been contracted prior to said 14th day of March, 1881, it applies to a class of debts not affected by the constitutional amendment in question, and is, in consequence, not in conflict with any of the provisions of that article of the Constitution.

The second section of the ordinance involves a pledge of full compliance with the provisions of section 3231, R. S. 1881, *supra*, and affords all the security in that respect which could reasonably be expected in advance of the regular times of making levies of the necessary taxes to carry the proposed new arrangement into full effect. It places the common council in the position of being easily required to make the necessary levies at the suit of any person interested in having such levies made.

Construing the complaint, as we do, to really and only mean that the appellees were taking measures to have a part of the indebtedness of the city of Madison, neither invalidated, nor in any manner affected, by the recently adopted article 13 of the Constitution, refunded, as the city has the power to do under existing laws, we feel constrained to hold that the facts averred did not present a cause of action against the appellees, and that, therefore, the appellant has no cause to complain of the ultimate result of the proceedings below. As having a bearing on some of the questions which have

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entered into this discussion, see the cases of *Sackett v. City of New Albany*, 88 Ind. 473 (45 Am. R. 467), and *City of Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. R. 416).

The judgment is affirmed, with costs.

Filed June 22, 1886.

No. 11,865.

ATKINSON v. DAILEY.

ATTORNEY AND CLIENT.—Value of Services.—Evidence.—Jury.—In determining the value of personal services, the jury must be governed by the evidence in the case.

SAME.—Reference to Third Persons to Fix Value.—Contract.—Where services have been performed and no dispute exists as to their value, a mere oral reference to a third person to fix their value is not conclusive.

INSTRUCTIONS TO JURY.—Practice.—In determining whether an instruction is erroneous, it will be considered in connection with the others given.

SAME.—It is not error to refuse to give instructions asked by a party when the subjects embraced in them are covered by the instructions already given.

SAME.—Harmless Error.—An erroneous instruction, if harmless, is not available for the reversal of a judgment.

From the Benton Circuit Court.

M. H. Walker, I. H. Phares and D. Fraser, for appellant.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellee.

MITCHELL, J.—This was a suit on an account for services rendered by the appellee, at the request of the appellant, in bringing and prosecuting an action for a divorce, and in assisting about the adjustment of some property rights between the appellant and her husband. The account included a small sum for rent.

There was a plea of payment, an answer of general denial, with other special answers, one of which set up a special con-

107	117
134	697
107	117
137	91
107	117
149	408
149	408
107	117
165	517
165	707

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tract under which it was alleged the services were performed. Another answer set up that the services were worth the sum of twenty-five dollars, and no more, and that that sum had been tendered the plaintiff and brought into court for his benefit.

These special answers, although not the subject of question here, were in the nature of answers in mitigation. All the evidence applicable to them was admissible under the general denial. *Blizzard v. Applegate*, 61 Ind. 368; *Smith v. Lisher*, 23 Ind. 500.

The plaintiff below had a verdict for one hundred dollars, upon which, over a motion for a new trial, judgment was rendered.

Certain instructions given by the court, and the refusal to give others requested on the appellant's behalf, are the chief, if not the only, subjects of contention.

The second instruction, given at plaintiff's request, after defining the nature of the action, informed the jury that to entitle the plaintiff to recover he must have proved by a preponderance of the evidence all the material allegations of his complaint; and, further, that in the event they should find from the evidence that services were performed by the plaintiff as attorney for the defendant, and that the reasonable value of such services had been proven, then the plaintiff was entitled to a verdict for the amount which the evidence proved his services were worth.

It is said this instruction ignores the defence that the services were performed under a special contract. This may be conceded. It did not purport to do more than define the plaintiff's rights under the complaint. Coupled with the other instructions, it must have been so understood.

The seventh instruction, given at the request of the defendant, presented the law of the case as applicable to the defence that a special contract existed. Construing both of these with those given by the court, and the jury must have

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understood this feature of the defence. *Boyle v. State*, 105 Ind. 469.

The jury were further instructed that in determining the value of the plaintiff's services, they should be governed wholly by the evidence in the case, and not by their judgment or preconceived opinions as to the value of such services. The objections to this instruction are not well founded. In determining the value of the services of an attorney, as of any other person, the evidence in the case, and not the preconceived opinions of the jury, is to control.

One of the defendant's answers presented the somewhat novel defence that the services were performed under a special contract, the effect of which was that in consideration that the defendant in the divorce suit would not resist the granting of a divorce, the appellee agreed to submit the amount of compensation which he should receive as attorney in the divorce case to the determination or judgment of the attorneys for the defendant, and that the defendant's attorneys had fixed the plaintiff's compensation at twenty-five dollars, which had been tendered. There was some proof tending to show that if any agreement of that description was made, it was not made until after the services were performed.

As bearing upon that feature of the case, the court instructed the jury, in substance, that if an agreement of the character mentioned was made, yet, if it was without consideration, it would not be binding on the plaintiff.

Upon the assumption that an agreement such as that stated would be valid under any circumstances, a proposition we do not decide, it certainly would be without consideration, and therefore invalid, if it was not made until after the services had been performed. Where services have been performed and no dispute exists as to the price or value, a mere oral reference to a third person to fix the value is not conclusive. There was evidence to which the instruction was relevant, and it was correct.

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Without examining in detail such of the defendant's instructions as the court refused, it is sufficient in this connection to say, the court having given other pertinent instructions, fully covering all that was proper or material in those asked, no error was committed in that regard.

The court of its own motion instructed the jury that as no payment had been proved, the plea of payment need not be considered by them. The plaintiff, in his testimony, admitted that the defendant was entitled to a credit of \$1.50 on the account for rent, that amount having been paid to plaintiff's wife.

A reversal is insisted upon because of this instruction. It is apparent that the court, as also the appellant's counsel, overlooked the small sum above mentioned. It would doubtless have been corrected if an instruction for that purpose had been asked. The jury could not have understood that the court meant to tell them as a proposition of law, that the defendant was not entitled to a credit on the rent for the sum admitted to have been paid. This is so plainly a harmless inadvertence, involving an amount so trifling, that we decline to reverse the judgment, even though the instruction was technically erroneous. The statute enjoins upon us not to reverse judgments, where it appears that the merits of the cause have been fairly determined in the court below. Section 658, R. S. 1881; *Billingsley v. Groves*, 5 Ind. 553.

There is nothing in the other instructions given which requires a reversal of the cause.

The judgment is affirmed, with costs.

Filed June 22, 1886.

Hutchinson v. Lemcke et al.

No. 11,303.

HUTCHINSON v. LEMCKE ET AL.

DECEDENTS' ESTATES.—*Widow's Interest in Real Estate.—Parties to Action.*—

Practice.—Under our present law, the court can in no case, for the purpose of paying debts against the estate of a decedent, order the sale of the portion of the real estate which the widow owns by reason of her marital rights, whether she is made a party to the proceeding or not.

NAME.—*Tenancy by Entireties.—Widow's Interest Prior to Statute of 1852.*—

Judgment.—Conclusiveness of.—Prior to the taking effect of the statute of 1852, the widow took only a dower interest in the real estate of her husband, and the probate court had power to order the entire fee sold for the payment of debts; and when the widow claimed to be the absolute owner of real estate by reason of a tenancy by entireties, and being made a party to a petition by her husband's administrator to sell such real estate, for the payment of the debts of his estate, failed to appear, and permitted such order to be made, she is bound by such proceedings, and can not afterwards assert title.

NEW TRIAL AS OF RIGHT.—*Waiver of Objection to.—Time of Granting.*—

Where, in an action for the recovery of real estate, a new trial is granted as a matter of right prior to the rendition of judgment, without exception or objection, and the parties proceed to try the case a second time, the objection which might have been made to the granting of a new trial before judgment is waived.

STATUTE OF LIMITATIONS.—*Administrator's Sale of Real Estate.*—Although an administrator's deed to real estate is prematurely made, the title of the purchaser is protected by the five years' statute of limitations, where the party injuriously affected is not under disability.

PRACTICE.—*Instructions Asked Must be Signed.*—There is no available error in the refusal of the court to give instructions asked, where the same are not signed by the party or his counsel.

From the Vanderburgh Circuit Court.

A. C. Tanner and W. W. Ireland, for appellant.

C. Denby, D. B. Kumler, P. Maier and A. Gilchrist, for appellees.

ZOLLARS, J.—Appellant brought this action to recover from Willard Carpenter, Alvin B. Carpenter and J. Augustus Lemcke, the undivided one-half of "the southwest half of lot 86," in the old plan of Evansville.

The facts in the case, as developed by the record, are sub-

107	121
126	218
127	228
107	121
150	110
152	164
107	121
156	58
156	612
156	619
156	620
107	121
100	668
107	121
171	699

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stantially as follows: In 1838 Abraham Hutchinson, appellant's husband, and one Francis Amory were the owners in fee simple of lot 86, in the old plan of Evansville, as tenants in common.

On the 17th day of June, 1840, Amory conveyed his interest in the southwest half of the lot to Abraham Hutchinson and his wife, appellant, which deed was duly recorded on the 21st day of July, 1840. Abraham Hutchinson being indebted to Alvin B. and Willard Carpenter, he and appellant, on the 25th day of October, 1841, executed and delivered to the Carpenters what appellant's attorneys call a trust deed, and what appellees' attorneys insist was a mortgage, covering the portion of the lot here in dispute.

The granting portion of the instrument is in form an absolute warranty deed, in consideration of \$1,960. It closed with the following: "And provided, however, and these presents are made as a deed of trust subject to the trust and conditions hereinafter mentioned. That is to say, that whereas A. P. Hutchinson is indebted to the said parties of the second part in the sum of \$1,960, due and payable in one year from the date hereof, with interest at the rate of 6 per cent. from date: Now, therefore, should the said Hutchinson well and truly pay the said party of the second part the said sum of money as above provided, with interest as aforesaid, then these presents shall cease and be null and void; but in case of the non-payment of the said sum of money, or any part thereof, as above specified, it shall and may be lawful for the said Carpenters, their agent or attorney, to sell said half-lot at public auction to the highest bidder, having first given thirty days' notice in the nearest public newspaper printed in the State, of the time and place of said sale, and therefor to make to the purchaser a good and sufficient deed in fee simple, applying the purchase-money towards the liquidation of said debt and expenses of sale, and returning the surplus, if any, and from thence all equity of redemption in said premises shall cease and determine; said parties of the second part

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hold a note of said Hutchinson for the sum of \$1,960. In witness whereof the said parties of the first part have hereto set their hands and seals this the date above written."

This instrument was recorded on the 9th day of November, 1841.

Abraham Hutchinson died on the 30th day of May, 1842, without having paid to the Carpenters the \$1,960, or any portion of it. It has not been paid, unless, as alleged in the complaint, it has been paid by the rents and profits of the premises, in the possession of appellees, or paid by Hutchinson's administrator. The premises were never sold by the Carpenters, nor by any one else as provided in the trust deed or mortgage, nor has that instrument ever been satisfied of record.

Abraham P. Coleman was appointed administrator of the estate of Abraham Hutchinson. On the 11th day of August, 1842, Coleman, as such administrator, filed a bill in the probate court of Vanderburgh county against appellant and her children, all minors, and the Carpenters, in which he alleged, amongst other things, that the personal estate was insufficient to pay Hutchinson's debts; that he died possessed, and the owner, of the half-lot here in dispute; that it was mortgaged to the school commissioners to secure the payment of \$179.40; that in 1841 Hutchinson was indebted to the Carpenters upon a judgment in the sum of \$187.68, which they were threatening to enforce by execution; that being thus pressed, and in danger of being financially ruined by such execution, and being induced by threats and promises by the Carpenters, he agreed to, and did, take a loan from them of \$805.75, which, with the amount of the judgment, made his indebtedness to them \$1,000; that \$960, by way of interest, was added, but was to be treated as a part of the principal debt, making the whole \$1,960 to be paid in one year, with 6 per cent. interest thereon, and secured by the trust deed or mortgage; that the Carpenters, to avoid a possible defence of usury, assigned to Hutchinson worthless accounts, to the amount of \$960, with

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an agreement that whatever portion of them could not be collected during the coming year, would be accepted back at fifty cents on the dollar, and the amount be deducted from Hutchinson's indebtedness, on condition that he would first satisfy the prior mortgage to the school commissioners; that to further avoid a possible defence of usury, the Carpenters insisted that there should be inserted in the trust deed or mortgage the power of sale, as above set out. The prayer in the bill was, that the conveyance to the Carpenters might be declared to be a mortgage; that they be compelled to take back the accounts at their face, and accept \$1,000 and interest thereon in discharge of the mortgage, and that the administrator might have an order to sell the half-lot for the purpose of paying off the mortgages thereon, and other debts against the estate, and that appellant might be subpoenaed to answer the bill.

She and the Carpenters having been subpoenaed and not appearing, the bill was taken as confessed, and it was adjudged and decreed that the Carpenters were entitled to \$1,-067.56, that all of the balance was usurious and void, that the deed from Hutchinson to the Carpenters was intended to be, and was, a mortgage, and that the widow and children had the right to redeem. An order was made authorizing the administrator to sell the real estate, and directing him to apply the proceeds to the payment of the Carpenters' claim, and the residue, if any, to the payment of the general debts against the estate.

On the 27th day of December, 1843, the administrator sold the half-lot in suit to Willard Carpenter for \$1,000, the building having been burned before the sale. On the 12th day of February, 1844, the sale was reported to and approved and confirmed by the court. The administrator's deed to Carpenter, executed on the 24th day of February, 1844, was recorded on the 16th day of August, 1844. On the 29th day of May, 1844, Alvin B. Carpenter and wife, in settlement of his partnership affairs with his brother, executed and deliv-

ered to Willard Carpenter a quitclaim deed for several tracts of real estate, among which was the half-lot described in the trust deed or mortgage by appellant and husband to the Carpenters. On the 12th day of April, 1858, Willard Carpenter conveyed the half-lot, with his other property, to Allis and Walker, assignees, for the benefit of his creditors. On the 2d day of June, 1858, Allis and Walker, as such assignees, sold and conveyed the half-lot to Alvin B. Carpenter. On the 11th day of March, 1863, Alvin B. Carpenter, in consideration of \$10,000, and by warranty deed, conveyed the half-lot to Schapker and Bussing. On the 1st day of January, 1872, Schapker and Bussing, in consideration of \$31,000, sold and by warranty deed conveyed the half-lot to Bernard Nure. On the 2d day of May, 1881, Bernard Nure, in consideration of \$33,000, sold and by warranty deed conveyed the half-lot to the appellee Lemcke. Shortly before the sale by the administrator, the buildings on the half-lot were burned.

There was evidence adduced upon the trial, that shortly after the fire, and before the sale by the administrator, Willard Carpenter assumed to be in the possession of the half-lot, by going upon it and removing the debris therefrom.

For the purposes of a decision upon the instructions, if such a decision shall be found to be necessary, such possession may be taken as an established fact. There was evidence also that no possession was taken by either of the Carpenters until after the sale by the administrator and the execution and delivery of his deed to Willard Carpenter, and that possession was taken by Willard Carpenter under and by virtue of the administrator's deed, and not otherwise. For the purposes of a decision of the case upon the evidence, that fact must be taken as established. The evidence shows that in March, 1845, after the execution of the administrator's deeds, Willard Carpenter took complete and exclusive possession of the half-lot, and, at an expense of at least \$2,000, erected permanent business buildings thereon, which, with out-buildings, covered the whole, or nearly the whole, of the half-lot.

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From that time forth until his assignment in 1858, he held the exclusive possession of the premises, rented the buildings, received the rents, and paid the taxes. After his purchase from the assignees in 1858, until he sold in 1863, Alvin B. Carpenter had the exclusive possession of the premises, rented the buildings, received the rents, and paid the taxes. Schapker and Bussing expended upon the property from \$15,000 to \$20,000, enjoyed the use of the property, and paid the taxes until they sold it in 1872. In like manner, Nure held the exclusive possession, paid taxes, etc., until he sold the property in May, 1881. Since then Lemcke has held the property in like manner. During all the years from the death of her husband, in 1842, until a short time before the beginning of this action, on the 1st day of June, 1881, appellant made no claim to the property, nor to any of the rents and profits.

Aside from the Carpenters, the several purchasers had no notice of appellant's rights, except such as the records afforded, and they had no actual knowledge of her claim under the Amory deed.

It is not shown by the evidence how much rent was collected by the Carpenters, nor is it shown by the evidence what the rental value of the property was, while it was held by the Carpenters, or since.

The first trial below resulted in a verdict for appellant. After verdict, and without any judgment thereon, the court granted a new trial under the statute, as a matter of right.

Mr. Palmer, as *amicus curiæ*, makes the point that under the statute the court had no right to grant a new trial without cause, and as a matter of right, until after the rendition of judgment, and that, hence, the order granting a new trial was a nullity, and that the judgment should be reversed, and the case left to be disposed of under the first verdict. If there had been an objection and exception to the granting of the new trial, there would be force in the point made. By proceeding to try the case a second time, without such ob-

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jections or exceptions, it must be held that appellant waived all objections that she might have made and urged against the granting of the new trial. *Marsh v. Elliott*, 51 Ind. 547; *Vernia v. Lawson*, 54 Ind. 485.

It is assumed by counsel for appellant, and tacitly conceded by counsel for appellees, that the deed from Amory to her and her husband made them tenants by entirety of an undivided one-half of the half-lot in dispute, and that by the death of her husband appellant became the absolute owner of the undivided one-half of the half-lot, and entitled to dower in the other undivided one-half.

Without entering into a discussion of the question, we assume that such were the rights of appellant. There is no question of dower involved in this case. The action is to recover an undivided one-half of the half-lot, upon the theory that she became the absolute owner of it by the death of her husband.

In the outstart, appellant's counsel argue that the probate court had no authority to order the sale of appellant's undivided half of the half-lot, that her rights and interests therein were in no way affected by the proceedings in the probate court, and the administrator's sale and deed based thereon. This argument is rested upon the cases of *Hanlon v. Waterbury*, 31 Ind. 168, *Kent v. Taggart*, 68 Ind. 163, *Elliott v. Frakes*, 71 Ind. 412, *Armstrong v. Cavitt*, 78 Ind. 476, and *Compton v. Pruitt*, 88 Ind. 171.

The case of *Hanlon v. Waterbury*, *supra*, was an action by a widow for partition, she claiming to be the owner of the undivided one-third of the lots as widow, and asserting that the defendant was the owner of the other two-thirds by virtue of a sale by the administrator of her husband's estate. The defendant answered, alleging that upon the petition of the administrator to the court, he had been ordered to sell, and had sold and conveyed, the whole of the lots; that the defendant had purchased them, believing that he was getting title to the whole of them, and asked that the heirs might

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be made defendants, and that the widow's interest in the several lots owned by her husband might be set off in lots, other than those purchased by the defendant. In the decision of the case the court said: "The widow's interest was not liable for the decedent's debts. The court did not decree its sale, and could not legally do so. The petition filed by the administrator, praying for an order to sell the lots, stated the fact that the decedent left the appellee, his widow, surviving; and the purchasers at or under that sale must be presumed to have known that she was entitled to one undivided third of the lots, which was not subject to sale for the payment of the husband's debts; and hence they can not claim to be purchasers in good faith, believing they were thereby acquiring unincumbered titles to the whole of the lots."

In the case of *Kent v. Taggart*, *supra*, the widow was not a party to the proceedings by the administrator for the sale of the real estate of her husband, and, of course, was not bound thereby.

The case of *Elliott v. Frakes*, *supra*, was an action by two children to recover real estate which they claimed as devisees of their mother. The leading facts set up in their complaint are, that their father died in 1854, the owner of real estate, and left surviving their mother as his widow; that by virtue of her marital relations, she became the owner in fee of the undivided one-third of the real estate; that, having willed that third to the plaintiffs, she died in February, 1856. The answer by the defendant, not denying the averments in the complaint as to the surviving widow and her will, set up the appointment of an administrator of the estate of the husband, and an order for, and the sale of the whole of the real estate by the administrator after the death of the widow, and the purchase of it by the defendant, and that the plaintiffs were parties to that proceeding. It was held, that, by not denying, the answer admitted the survival of the widow, to whom one-third of the land descended in fee simple. It was said: "Upon the facts thus admitted, the common pleas court

* * had no power to order the sale of more than two-thirds of the tract of land in question, for the payment of the debts and demands against the estate of John Sipe, and if the order of sale, set up in this paragraph of answer, purported to authorize and direct the sale of the whole tract, it was simply inoperative and void, as against the interest which descended to the widow." In answer to the contention that the plaintiffs were bound by the order of sale, it was held that as they were parties only as the children and heirs of their father, they were bound only as such, and not as the devisees of their mother, and that hence the interest which they got from her was not affected by the proceedings and order of sale.

The case of *Armstrong v. Cavitt, supra*, was an action for the partition of real estate by the children and heirs of Armstrong, deceased. They alleged in their complaint that their father left surviving a second wife, who had since died without children, and that they thereby became the owners of the one-third of the real estate which had descended to her from their father. The defendants answered that the administrator of the estate of the plaintiffs' father had applied for an order from the court to sell the whole of the real estate of the father for the payment of debts against the estate; that to that proceeding the plaintiffs and the widow were made parties by proper notices; that the plaintiffs appeared and answered by guardian *ad litem*, and that the widow was defaulted; that the court found that the widow was owner of a life-estate in one-third part of the real estate, and ordered the whole of it to be sold subject to that life-estate; that afterwards the widow consented that her so-called life-estate might be sold also by the administrator, and he sold the whole of the real estate, and paid over to the widow the value of her life-estate. It was held that under the statutes of descents, upon the death of the widow, the share which descended to her would descend to the plaintiffs, children by the first wife. It was also held that so far as the administrator's petition

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sought the sale of the widow's interest in the real estate, the court of common pleas did not have, and could not acquire, jurisdiction of the subject-matter of such petition; that her interest in the real estate descended to her in fee simple, free from all demands of the creditors of her deceased husband, and, therefore, was not subject to be converted into assets for the payment of his debts. It was also held that the court did not have jurisdiction of the persons of the plaintiffs, as children of the decedent, so as to bind them as to any interest then held by the widow, because, at that time, they had no interest in the portion that had descended to her.

The case of *Compton v. Pruitt, supra*, was an action for partition by a widow. The defendant answered that the administrator of the estate of the plaintiff's husband procured an order to sell the entire fee simple of the land to pay the debts against the estate; that the plaintiff was a party to that proceeding; that in pursuance of the order, the administrator sold the whole of the land, and that the purchasers, with the knowledge of the plaintiff, took possession, and had occupied the land in good faith for ten years, and claimed to own it in fee simple. In deciding the case, BICKNELL, C. C., quoted section 75, 2 R. S. 1876, p. 519, which gave the court authority to sell the real estate of the deceased, and said that that section gave the court no authority to sell the wife's land; that when the husband dies his wife's one-third is no longer the real estate of the deceased. After quoting the statute which provides that the petition by the administrator for a sale of real estate shall contain "a description of the real estate of the deceased, liable to be made assets for the payment of his debts, or so much thereof as the executor or administrator may deem it necessary to sell," it was said: "In this case the petition stated that the decedent died seized of the land, etc., leaving a widow. That was equivalent to a statement that only two-thirds of it was liable to be made assets. It notified the court and all parties in interest to that effect, as fully as if the language had been that of clause 3, *supra*,

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and had stated expressly that the land to be sold was two-thirds of the land described. So the notice of the application to sell stated that the administrators had filed their petition to sell the real estate of the decedent, nothing more. Such a petition and notice did not inform the widow of an intended attack upon her rights, and she was guilty of no laches in failing to appear in the proceeding. She had a right to presume that the land liable to be made assets was the only subject of the petition, and against such a petition she had no defence." After quoting from cases, it was further said: "These cases show that, in Indiana, under the ordinary statutory proceeding to sell a decedent's land to make assets, the attempted sale of the widow's land is a mere nullity and has no effect upon her rights. She remains a tenant in common with the purchaser."

These decisions have been approved in later cases, and we have no doubt stated the law of the cases in which they were pronounced correctly. *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Nutter v. Hawkins*, 93 Ind. 260; *Matthews v. Pate*, 93 Ind. 443; *Pepper v. Zahnsinger*, 94 Ind. 88; *Clark v. Deutsch*, 101 Ind. 491; *Frakes v. Elliott*, 132 Ind. 47.

A careful examination of the cases above cited and stated will show that they rest, in the main, upon the propositions:

First. That the courts have no authority to order the sale of lands to pay debts against the decedent's estate except the lands belonging to, and forming a part of, the estate.

Second. That upon the death of the husband, one-third, one-fourth, or one-fifth of his real estate, according to the value of the whole, descends to, and becomes the property of, his widow in fee simple, free from all demands of creditors, and does not belong to, or form a part of, the decedent's estate.

Third. That parties to a proceeding by the administrator to obtain an order for the sale of real estate to pay debts are bound, and only bound, in the capacity in which they are sued.

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Fourth. That the statement in the petition for such an order, that there was a surviving widow, is, in law, equivalent to a statement that she is the owner in fee simple of the third, fourth or fifth part of the real estate, according to the value of the whole, as against all demands of creditors, and that, therefore, the application is, in law and in fact, only to sell the remainder as belonging to, or forming a part of, the estate.

It results from these propositions, that in no case can the court, under our present system, for the purpose of paying debts against the estate, order the sale of the portion of the real estate which the widow owns by reason of her marital rights. If she is not made a party to the proceedings by the administrator to procure an order for the sale of the real estate, of course, neither she nor her rights can be affected thereby. If she is made a party to such proceedings as a widow, the record will affirmatively show her rights; that as such widow she owns a part of the real estate; that the portion which she thus owns is not a part of the estate liable for the debts, and hence can not be sold for that purpose. And thus the record will be notice to the court and to the world that her portion of the real estate can not be, and has not been, sold by the administrator. A statement of the real estate of which the decedent was the owner is necessarily a statement that the widow owns a portion of it, which is not subject to sale by the administrator.

The above cases are not conclusive or controlling here. Under the law in force at the time the probate court ordered the sale of the half-lot, and until the statute of 1852, the widow did not take a fee in any portion of her husband's real estate, but only a dower interest. The probate court, therefore, had authority to order the sale, and direct the conveyance, of the fee to the whole of the real estate of which appellant's husband was the owner at the time of his death.

The Carpenters had a conveyance for the half-lot, as we have seen, absolute in form, with power to sell and apply the proceeds to the payment of the \$1,960, purporting to be due

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to them from appellant's husband. The purpose of the bill filed by the administrator in 1842 against appellant and her children, and the Carpenters, was to cut out the usurious portion of the debt to the Carpenters, to have the conveyance to them declared to be a mortgage simply, to quiet the title to the half-lot as against all claims by them, and to have the half-lot sold as property belonging to, and forming a part of, the estate, for the payment of the amount due on the mortgage and other debts against the estate. All this the probate court, as then constituted, and exercising chancery powers, had authority to do.

It was alleged in the bill that appellant's husband died possessed, and the owner, of the entire half-lot. The bill showed upon its face that appellant was the widow of the decedent, and while that might show that she, as such widow, was entitled to dower, it would not show that she had any other interest in the half-lot. The bill, therefore, was not notice to the court, nor to any one else, of appellant's rights under the deed from Amory to her and husband. She was the owner of the undivided one-half of the half-lot by virtue of that deed and the death of her husband, and not by virtue of her marital relations only, as in the cases above noticed. As we have said, one purpose of the bill was to settle the title, so that the half-lot might be sold as realty, forming a part of the estate. Appellant was properly notified to appear and answer the bill, neglected to do so, it was taken as confessed, and the whole of the half-lot was ordered sold. The bill notified appellant that the administrator was claiming the whole of the half-lot as a part of the estate, and asking for its sale as such.

It was stated in the bill, it is true, that she was the widow of the decedent, but the averments of the bill, taken together, amounted to an averment that she had no rights in the half-lot except as widow. The bill was a challenge to her to resist the claims of the administrator and assert her title. She knew that as widow simply she took nothing in the undivided

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half of the half-lot, and that her title was under the deed from Amory. The bill notified her that one purpose was to settle the title to the half-lot, and she was bound to know that unless she appeared and set up her title, the whole of the half-lot might be adjudged to be a part of the estate of her deceased husband, and ordered sold as such to pay the debts against that estate. That adjudication was made, the whole of the half-lot was ordered sold as a part of the estate, it was so sold, the sale was confirmed, and the deed was made in 1844.

The record of the proceedings contained nothing to give notice to the court or to any one else of appellant's rights under the Amory deed, nor to put any one upon inquiry. Under the law as applied to the facts in the case, appellant can not now be heard to say that she was the owner of the undivided half of the half-lot, and that the sale under the orders of the court is a nullity. We are amply supported in this conclusion by the recent case of *Lantz v. Maffett*, 102 Ind. 23, which involved these facts: A widow and mother took one-third of her deceased husband's real estate. She subsequently married, and died during coverture. Under the law as applied to these facts, the real estate, which descended to her at the death of her first husband, at his death, descended in fee simple to her children by that husband. After her death, however, an administrator of her estate was appointed. He petitioned the court for an order to sell the realty to pay the debts against her estate, and alleged therein that she was the owner thereof in fee. To this petition and proceeding her children by her first husband were made parties, and answered by a guardian *ad litem*. The real estate was ordered to be, and was sold by the administrator. The children subsequently brought an action against the purchaser, and, by the judgment of the court below, recovered the real estate. The purchaser appealed, and this court, reversing the judgment, held that the court had jurisdiction to try and determine the question of title to the real estate sought to be sold

by the administrator to pay debts due from the estate of the intestate, and that the children were precluded by the proceedings and judgment ordering the sale, from afterwards setting up title to the real estate.

As to the title to the half-lot, and any claim of appellant thereto, Willard Carpenter, as any other person might have done, had a right to rely upon the record of the proceedings which resulted in the order of sale. That record showed an adjudication that the half-lot belonged to and was a part of the estate of appellant's deceased husband, and that she had no interest therein.

With much ability and research, appellant's counsel argue at length that Willard Carpenter could not hold the half-lot under his purchase from the administrator, and that his purchase enured to the benefit of appellant. This argument is based upon the contention that he was a trustee under the instrument, which they insist was a trust deed, and that as such trustee he could not purchase and hold the property which he held for his *cestui que trust*, and that he could not deal with the property, except to sell it as in the instrument provided.

It is not necessary for us to express an opinion as to whether that instrument was simply a mortgage to secure a debt. That question was settled by the probate court in the proceeding already noted, in which the administrator, the Carpenters and appellant were parties. That court had the undoubted right to settle that question in that proceeding, and did settle it, by adjudicating and decreeing that the instrument was a mortgage simply, from which appellant and the heirs might redeem. It was not left for the Carpenters to sell under the power of sale contained in the mortgage. The effect of the judgment and decree was that the Carpenters could not, and should not, sell the property to make their claim, because it was adjudged and decreed that the administrator should sell it and pay off the Carpenters' mortgage. The court thereby took the property into its custody to be disposed of as it had directed.

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Whatever might have been said originally, after that adjudication and decree, the Carpenters did not hold the property, or any part thereof, for sale as trustees for appellant, because, First, by that adjudication it was determined and settled that appellant was not the owner of the whole, nor any portion of the half-lot; Second. The court, as we have seen, took the property into its custody, decreed that the Carpenters had nothing but a mortgage, and that the administrator should sell the property and pay off the mortgage; Third. The administrator sold the half-lot in obedience to the orders of the court, and, the presumption is, paid off the Carpenter mortgage. There was no reason, therefore, why Willard Carpenter might not purchase the half-lot from the administrator. When we hold that the probate court had authority to settle the question of title, and order the sale of the half-lot, and that Willard Carpenter might purchase it, we have disposed of the case.

Aside from the questions of the power of the probate court to order the sale, and the right of Carpenter to purchase, appellant makes no question as to the regularity of the probate proceedings which resulted in the sale, except a question that the administrator's deed was prematurely made. The record does not affirmatively show that fact, and if it did it would make no difference, as appellant commenced no action to recover the half-lot within five years from the time the sale by the administrator was confirmed by the court. *Vancleave v. Milliken*, 13 Ind. 105; *Vail v. Halton*, 14 Ind. 344; *Nave v. Tucker*, 70 Ind. 15; *White v. Clawson*, 79 Ind. 188; *Gray v. Stiver*, 24 Ind. 174; *Brenner v. Quick*, 88 Ind. 546; *Hatfield v. Jackson*, 50 Ind. 507; *Wright v. Wright*, 97 Ind. 444.

The judgment of the court below in favor of appellees is right upon the evidence, aside from any question of the twenty years' statute of limitations.

It is not improper to note in passing, however, that from the time Carpenter received the deed from the administrator in 1844, until this action was commenced in 1881, he and

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his grantees have been in the exclusive, uninterrupted and unquestioned possession of the half-lot.

There is no available error in the refusal of instructions asked by appellant. In the first place, they were not signed by appellant, nor by her counsel, as the statute requires. *R. S. 1881, section 533; Jeffersonville, etc., R. R. Co. v. Vancant*, 40 Ind. 233; *Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239; *Sutherland v. Hankins*, 56 Ind. 343; *State, ex rel., v. Sutton*, 99 Ind. 300, and cases there cited. In the second place, some of them are based upon the theory that the orders and decree by the probate court, and the sale by the administrator, were nullities, and that notwithstanding that decree and the sale and the purchase by Willard Carpenter, he held and possessed the half-lot as appellant's trustee. They were, therefore, based upon an erroneous theory, and were properly refused. Others are based upon the theory that the orders and decree of the probate court, the sale by the administrator, and the purchase by Willard Carpenter were nullities so far as concerns the interest now claimed by appellant, and that hence, as to that interest, Carpenter and his grantees were tenants in common with appellant. Here again, the theory is a false one, and the instructions for that reason were properly refused.

It can make no difference whether Carpenter may have taken possession before or after the sale and deed by the administrator. Under the judgment and decree of the probate court, to which all interested persons were parties, he could no longer be regarded as in any sense a trustee. Under the conclusions we have felt constrained to adopt as to the force and effect of the proceedings by the probate court, the instructions given by the court upon the trial below were more favorable to appellant than they should have been. The giving of them, therefore, can not be urged by her as an available error.

It results from our holding that the judgment must be affirmed. It is, therefore, affirmed at appellant's costs.

Filed June 19, 1886.

Fosdyke, Assignee, v. Nixon.

No. 12,293.

FOSDYKE, ASSIGNEE, v. NIXON.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—Pleading.—Sufficiency of Creditor's Claim.—A claim against the estate of a debtor, who has made a voluntary assignment for the benefit of his creditors, is sufficient when it informs the assignee of the nature and amount of the creditor's demand. The strict rules of pleading will not be applied to such claims.

SAME.—Purchase of Claims Against Debtor.—Enforcement Against Estate.—A good-faith purchaser of claims against an embarrassed debtor, who has made an assignment of his property for the benefit of his creditors, is entitled to the distributive shares of the original holders of the claims, and may enforce payment against the debtor's estate in the hands of the assignee.

From the Fountain Circuit Court.

T. F. Davidson, for appellant.

G. W. Paul, J. E. Humphries and J. B. Martin, for appellee.

Howk, C. J.—Appellee, John T. Nixon, claimed to be a creditor of one Marshall Nixon, an embarrassed debtor, who had made a general assignment of all his property in trust for the benefit of all his *bona fide* creditors, to the appellant, Fosdyke, under the provisions of our voluntary assignment law, in force since March 5th, 1859. Appellant refused to allow appellee's claim, when presented, and thereupon such claim was docketed in the court below as a cause for trial. An answer in six paragraphs was filed by appellant to appellee's claim or complaint, the first three paragraphs of which answer were subsequently withdrawn. Appellee's demurrers to each of the remaining paragraphs of answer were sustained by the court, and appellant refusing to amend or plead further, appellee had judgment for the amount due on his claim.

Appellant has here assigned, as errors, the sustaining of the demurrers to each of the fifth and sixth paragraphs of his answer, and that appellee's claim or complaint does not state facts sufficient to constitute a cause of action.

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There was no demurrer below to the claim or complaint, but appellant's objections thereto are made for the first time in this court. The claim consists of a judgment which appellee had recovered against Marshall Nixon, and of other judgments, notes and accounts against Marshall Nixon, all duly assigned to the appellee. A number of technical objections to the claim or complaint are pointed out by appellant's counsel, in argument, some of which might have been reached by motion to make the claim more certain and specific. The strict rules of pleading ought not, we think, to be held applicable to such a claim, and where, as in this case, the claim clearly informs the assignee or trustee of the nature and amount of the creditor's demand, it should be held sufficient, even on demurrer, and certainly so when its sufficiency is called in question, for the first time, by an assignment of error in this court.

The fifth paragraph of appellant's answer was addressed to so much only of appellee's claim or complaint as relates to the judgments, notes or accounts, and each of them, alleged to have been acquired by appellee by assignments from the original owners and holders thereof; and the appellant averred therein that such judgments, notes and accounts, and the assignments thereof, were procured to be made to appellee in the manner and for the consideration and purpose following, and in no other manner and for no other consideration whatever; that after the execution of the assignment by Marshall Nixon to appellant, and after he had qualified as assignee and entered upon the discharge of the duties of his trust, and after he had become possessed of all the property assigned to him by Marshall Nixon, the latter became desirous of procuring a compromise, settlement and release of the debts and demands held against him by his creditors, and to that end and purpose he executed a power of attorney, appointing one Andrew P. Potts his attorney in fact to act for him, and in his name, in negotiating and perfecting a settlement between him and his creditors, and authorizing his at-

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torney to make such settlement with any creditor who would take twenty-five cents on the dollar of the amount due him, to be secured by acceptable promissory notes payable, as should be agreed on, in not less than six months nor more than eighteen months from their dates with interest, and that he would furnish the notes as required to enable his attorney in fact to complete such settlements as he might make, authorizing such attorney to take assignments of all claims he might succeed in adjusting, to John T. Nixon; that said Andrew P. Potts accepted the agency and employment conferred upon him by such power of attorney, and acting alone thereunder and pursuant thereto, he entered into negotiations with the creditors of said Marshall Nixon and effected a settlement and compromise with each of the original holders of the several claims alleged by appellee to have been assigned to him; that it was agreed between Potts, as such attorney in fact, and each of the original holders of such claims, that they would accept in full satisfaction thereof the promissory notes of appellee and one Henry P. Nixon for the several amounts to be paid them respectively, which notes were executed and furnished by appellee and Henry P. Nixon to said Potts, at the request of Marshall Nixon, and were made payable to the several holders of such claims, and were in such sums and payable at such times as agreed upon between said Potts and each of the several holders of such claims, and that such notes were delivered by said Potts to, and accepted by, the original holders of such several claims, in satisfaction and discharge thereof; that immediately after the acceptance of such settlement, and as part thereof, each of the original holders of such claims, as settlement with each was made, severally executed an instrument in writing, which appellant called a release, in the words and figures following, to wit:

"We, the undersigned creditors of Marshall Nixon, of Veedersburg, Fountain county, Indiana, hereby mutually agree to accept twenty-five cents on the dollar of the debts

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due to each of us from said Marshall Nixon, in full compromise, settlement and satisfaction of our several claims against him, and to forever release him from the payment of the residue of such indebtedness; to be a full composition and settlement of all our several claims against said Marshall Nixon, for any cause whatever. Said twenty-five per cent. of our several claims against said Nixon to be paid in cash, or secured by first-class negotiable paper, payable in six, twelve and eighteen months, with interest, such claims to be settled as aforesaid on or before the 1st day of February, 1884. In case any of the creditors of said Nixon fail or refuse to sign this composition-agreement, that fact shall not invalidate this agreement as to those who do sign it; and in that event, the creditors of Marshall Nixon, who do sign this agreement, agree to sell and assign their said respective claims against him to John T. Nixon, at the rate of twenty-five per cent. of such claims, who is to furnish the money to complete this settlement. And in that case, each several claim aforesaid is to be assigned to said John T. Nixon, and upon his payment of twenty-five cents on the dollar as aforesaid, said John T. Nixon shall be the absolute owner of each of such claims so assigned and paid for. It is further agreed that, so far as we are concerned, the funds in the hands of Walter Fosdyke, assignee of Marshall Nixon, may be used in making this settlement, if the same is made. December 29th, 1883."

Appellant further averred, that such release was executed, at different times, by each of the original holders of such several claims, set forth in appellee's complaint, which were alleged therein to have been acquired by him by assignment; that all of such claims were so compromised, settled, satisfied, assigned and released prior the first day of February, 1884; and that the agreements to settle, compromise and satisfy such several claims were made solely with said Potts, as attorney in fact as aforesaid of Marshall Nixon, and by each of such creditors separately acting for himself, and that

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appellant was not a party to any of such agreements; that the assignments to appellee of such several assigned claims, set forth in his complaint, were procured by said Potts, acting under the authority aforesaid, at the times when such settlements and releases were executed; that such assignments were not executed upon any other consideration or for any other purpose than as herein stated; that all the creditors of Marshall Nixon did not accept the compromise offered by his attorney in fact, and did not execute the composition-agreement; and that many of such creditors, representing claims against Marshall Nixon, amounting in the aggregate to \$25,000, refused to accept the offered compromise or to execute such composition-agreement.

The sixth paragraph of answer states substantially the same facts as the fifth paragraph, as a defence to appellee's action.

We are of opinion that the court committed no error in sustaining appellee's demurrers to the fifth and sixth paragraphs of appellant's answer, or either of them. An embarrassed debtor, who has made a voluntary assignment of all his property for the benefit of all his *bona fide* creditors, is not thereby precluded, we think, from making an honest effort, with the assistance of kinsmen or friends, to effect such a settlement with his creditors as will enable him to obtain a speedy release from his debts, and to start anew in the active business of life. After Marshall Nixon had made his assignment, and after appellant, as his trustee, had obtained possession of all the assigned property, it is stated in appellant's answer that Marshall Nixon executed a power of attorney, constituting Andrew P. Potts his attorney in fact and authorizing such attorney to effect a settlement of his debts with his creditors, at twenty-five cents on the dollar, if it could be done. He had the right to make such an offer. He knew, no one better than he, what the amount of his indebtedness was and what percentage of his debts his estate would probably pay. Appellant has nowhere alleged that Marshall Nixon's property would pay a greater percent-

Fosdyke, Assignee, v. Nixon.

age of his debts than his attorney was authorized to offer, and it was probable at least that it would pay much less. No fraud is imputed in either paragraph of appellant's answer, either to Marshall Nixon or to his attorney in fact, in any of the transactions of either with any of Nixon's creditors. The written instrument, set out in the answer and called a release, by its express terms, was not to operate as a release unless it should be signed by all the creditors of Marshall Nixon, and appellant averred that many of the creditors had never signed such instrument. It was not binding as a composition-agreement, for the want of execution by all such creditors. *Evans v. Gallantine*, 57 Ind. 367.

Further, it was expressly stipulated in such agreement that, if it should not be executed by all the creditors of Marshall Nixon, that fact should not invalidate the agreement as to those of the creditors who did execute it, but that, in such case, their claims against Marshall Nixon should be assigned and set over to the appellee. This stipulation in the agreement was manifestly just and equitable, as it seems to us, as it would operate to indemnify the appellee to some extent for the hazard he assumed in assisting Marshall Nixon to effect a compromise, and could do the appellant and the objecting creditors no possible harm. Appellee had the right to purchase for a fair price the claims of the creditors of Marshall Nixon and to enforce their collection against the latter's estate in the hands of appellant. It is not shown that appellee's position, or his relation to Marshall Nixon, was such as to give him any undue advantage over the creditors of the latter in the purchase of their respective claims against him. Nor is it alleged by appellant, in either paragraph of his answer, that the appellee had not paid the creditors the full and fair value of their several claims purchased by and assigned to him. In truth, the appellant has nowhere imputed to the appellee any fraud or evil practice in his dealings with the creditors of Marshall Nixon. Under our law, fraud is never presumed, but it is a fact, if it exists, which must be averred

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and proved. Section 4924, R. S. 1881; *Morris v. Stern*, 80 Ind. 227, and cases cited; *Dessar v. Field*, 99 Ind. 548.

It is not controverted that the assigned claims, mentioned in appellee's complaint, were valid and subsisting debts of Marshall Nixon, justly entitled to their distributive share of the trust estate in appellant's hands. We know of no sufficient reason, and none has been suggested, for holding that the appellee should be deprived of such distributive share of such trust estate.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed June 22, 1886.

107	144
138	186
107	144
140	302
107	144
149	406

No. 12,792.

KENNEDY v. THE STATE.

CRIMINAL LAW.—Right of Citizen to Pursue and Arrest Felon.—Murder.—

Where a pickpocket is discovered plying his vocation in a crowd, a citizen has the right to arrest him upon fresh pursuit, without a warrant, and if the wrong-doer kills him while he is attempting to make the arrest, it is murder.

SAME.—Proof of Distinct Felony.—In such case, on the trial of the thief for murder, it is competent to prove, by either direct or circumstantial evidence, the recent commission of the robberies and the connection of the accused therewith, for the purpose of showing that the citizen was engaged in the performance of his duty when slain.

SAME.—Instruction.—Speculative Doubt.—A speculative doubt as to the possibility of innocence is not such a doubt as requires an acquittal, and the jury may be so instructed.

SAME.—Instructions Considered Together.—Practice.—Where all the instructions, considered together, correctly state the law, the judgment will not be reversed because one may be defective.

SAME.—Repetition of Information Not Required.—Where the court instructs the jury as to what must be proved to constitute a felonious homicide, it is not necessary to repeat such information in subsequent instructions.

From the Decatur Circuit Court.

Kennedy v. The State.

J. J. Spann, J. Q. Thomas, W. A. Moore and J. O. Marshall, for appellant.

F. T. Hord, Attorney General, *M. D. Tackett*, Prosecuting Attorney, *J. D. Miller, F. E. Gavin and W. B. Hord*, for the State.

ELLIOTT, J.—On the 1st day of November, 1884, a political meeting was held in the city of Greensburg, and a great crowd of people gathered to hear the speaker, who addressed them from a carriage standing on one of the streets of the city. Pickpockets plied their vocation, crowding and jostling through the throng. There were at least four men engaged in picking pockets, and they acted in concert. The clerk of one of the hotels in Greensburg testifies that four men became guests of the hotel early on the morning of the 1st day of November, three of them taking rooms and the other occupying a chair in the office. The appellant is identified by the hotel clerk as one of these persons, and a police officer of Cincinnati testifies that the appellant told him several days before the 1st day of November that he intended to be at the meeting in Greensburg on that day.

Charles Wallace was called as a witness by the State, and declined to testify as to what occurred in the throng where the pockets were picked, but testified that when he was arrested Kennedy was with him and was the person nearest to him at the time. The constable, Anderson, testified that he arrested Wallace, and at the time was struck on the head by the man nearest Wallace with a revolver and felled to his knees. Quite a number of witnesses who had their pockets picked swore that they were jostled in the crowd by four men, and many of them testified that Kennedy was one of the four. David Baker, the man who was killed, as the State charges, by Kennedy, was in the throng not far from the carriage in which the speaker who made the address was standing. Some one attempted to pick Baker's pocket, and some one did pick

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the pocket of Mr. Slocum, standing near by, whereupon an alarm was raised that there were pickpockets at work in the crowd. The four men who were engaged in the work of picking pockets then made their way out of the throng, and were followed by the deceased and Henry Woodfill. These two men, Baker and Woodfill, followed the men whom they supposed to be pickpockets for some distance, but ceased pursuit for a little time. They resumed it, however, after arming themselves with revolvers, and were joined by the constable, Anderson, and perhaps others. After the constable had seized Wallace, the man who was with him fled, and was pursued by Baker and other citizens. In the course of the pursuit one or more shots were fired by the pursuers, and a shot was fired by the pursued which killed Baker almost instantly. Many persons joined in the chase, and prior to any shooting the men, followed by the constable and those with him, were commanded to halt, and according to many of the witnesses outcries of "catch them," "halt," "they are thieves," or similar cries, were made by persons on the street.

The trial court permitted the State to prove by several persons that their pockets were picked in the crowd gathered about the speaker on the evening of November 1st. In this there was no error. There was evidence clearly tending to identify the appellant as one of the gang of robbers who were plundering the people. Several witnesses identify him by his personal appearance and his dress; several quite positively identify Charles Wallace as one of the gang. Wallace himself swears that Kennedy was with him at the time of his arrest, a few minutes after the robberies were committed, and many other witnesses declare that Kennedy is the man who struck the constable while arresting Wallace, and shot Baker. It was, therefore, perfectly proper for the court to permit the evidence to go to the jury, for it is quite well settled that where there is any positive or circumstantial evidence connecting a party with a material and relevant occurrence, it is

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proper to submit evidence of that occurrence to the triors of the fact.

The evidence that robberies had been committed was relevant and material, and so was evidence connecting Kennedy with those felonies. If Kennedy was one of the four engaged in picking pockets, then the constable, and, indeed, the citizens, Baker and Woodfill, had a right to arrest him upon fresh pursuit without a warrant. In this instance the evidence is strong against the accused, for here an attempt was made to pick the pocket of Baker, that of Slocum was picked near by, and Woodfill, who joined Baker in the pursuit, had also been robbed, so that these men not only had a right to arrest the felons, but it was their duty to do so, under the long settled rule thus stated in one of the old books: "All persons whatsoever, who are present when a felony is committed, or a dangerous wound given, are obliged to apprehend the offender; otherwise they are liable to be fined and imprisoned for the neglect." Law of Arrest, 200; 1 Chitty Crim. Law, 16; 1 Bishop Crim. Proc., sections 164, 165. As a citizen who sees a felony committed has a right to apprehend the felon, the wrong-doer is guilty of murder if he slays him while engaged in the exercise of that right. It is, therefore, competent to prove the commission of a distinct felony, if witnessed by a citizen, for the purpose of showing that the citizen was engaged in the performance of his duty when slain by the felon. Here, too, we have another element making strongly against the accused, for here the officer whose sworn duty it was to arrest and bring the offender to justice, was with the citizen who lost his life in pursuit of the criminal, and that officer had been struck with a weapon while engaged in the performance of his duty. A stronger case for the application of the rule can scarcely be imagined.

It is not necessary that an offender whom a citizen undertakes to arrest should be connected with the felony by direct evidence; it is sufficient if the evidence supplied by circum-

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stances establishes this connection; and in this instance we have both kinds of evidence strongly, if not conclusively, connecting Kennedy with all the felonies that were committed. With many of them he was connected by direct evidence, and the circumstances fully justified the inference that he was connected with them all. No other party of men is shown to have acted as the party with which he was connected did act, and the just inference is that the members of that party committed all of the felonies. At all events, there was evidence so connecting all of the party, of which Kennedy was a member, with all the felonies—thirteen in number—as to make it proper to leave the question to the jury.

We have no doubt that the general rule is, that one distinct felony can not be established by proof of another crime, but, to this general rule, there are very many and very important exceptions. One of these exceptions, as well settled and known as the rule itself, is, that where two crimes are connected both may be proved. This familiar doctrine applies to this case. Here, the citizen knew of the perpetration of a crime and started in pursuit of the perpetrator, so that to show that he was seeking to apprehend the proper person, it was competent to prove that a felony had been recently committed, and that the pursuit was fresh. It would be impossible for a man to justify an arrest unless he were permitted to prove that a felony had been committed, and so, too, it would be impossible for the State to make out the crime of murder unless evidence were permitted to go to the jury to prove that the person killed was pursuing a felon. An accused can not deprive the State of the right to give evidence tending to show that the pursuit was rightful, by urging that in proving that fact proof is made of a distinct felony.

The court gave this instruction: "But the law does not require impossibilities in criminal cases, and, therefore, does not require, as a condition precedent, that the mind of a juror

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be convinced beyond the possibility of a doubt produced from mere speculation. Whenever there is a doubt resting in the mind of a juror as to a material fact which the evidence has not removed, that is a reasonable doubt which the defendant should have the benefit of, and if a doubt material to the defendant's guilt, the juror should not agree to a verdict of guilty; but when the evidence has removed from the mind all reasonable doubt, and the jurors can only imagine a possibility of innocence from speculation, then the juror is satisfied of guilt beyond a reasonable doubt." This instruction is confused, and is justly subject to verbal criticism, but we do not think it could have misled the jury. It is evident that the jury must have understood the instruction to mean that a speculative doubt as to the possibility of innocence was not such a doubt as required an acquittal, and, thus understood, the instruction correctly asserts the law, for all the authorities agree that mere speculative doubts are not such as the law contemplates in providing that in case a reasonable doubt is entertained the accused must go acquit. The court did not tell the jury that a doubt may not arise from lack of evidence; on the contrary, it expressly said that "when the evidence has removed from the mind all reasonable doubt," there may be a conviction, thus clearly implying that there must be evidence strong enough to remove all reasonable doubt. The cases of *Densmore v. State*, 67 Ind. 306 (33 Am. R. 96), *Wright v. State*, 69 Ind. 163 (35 Am. R. 212), and *Batten v. State*, 80 Ind. 394, 402, are, therefore, not in point. But we are not to consider the instruction as if it stood alone, as it is well settled that all the instructions must be considered together. *Boyle v. State*, 105 Ind. 469; *Shular v. State*, 105 Ind. 289; *Story v. State*, 99 Ind. 413; *Goodwin v. State*, 96 Ind. 550. The eleventh and thirteenth instructions are upon the same subject as the twelfth, the one copied by us, and these, taken in connection with the twelfth, so clearly put the law before the jury as to make fair debate impossible.

The appellant's counsel assail that part of the fifth instruc-

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tion which reads thus: "Where a felony has been committed so recently that it is yet fresh, a private citizen may pursue the felon and arrest him if he attempts to escape, and if during the flight the pursued turns upon his pursuer and shoots and kills him, the killing will be one of the degrees of felonious homicide that I have mentioned, and this without regard to the means used and efforts being made to capture him. Under such circumstances the pursued being a wrong-doer, and his wrongful act leading to the homicide, the law will not excuse him."

The objection to this instruction is thus stated in counsel's argument: "The objection to the charge is that it entirely omits to state either that the killing must have been done purposely and with premeditated malice, or purposely and maliciously done, or voluntarily even." If this instruction stood alone it would not be vulnerable to the objection urged, for it is very clearly implied in the expression, "if the pursued turns upon his pursuer and shoots and kills him, the killing will be one of the degrees of felonious homicide that I have mentioned," that the killing must be purposely done. This, surely, is the meaning that the instruction would convey to the mind of a man of ordinary intelligence; as this is so the jury could not have been misled. *Boyle v. State, supra; Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, p. 435; *Union M. L. Ins. Co. v. Buchanan*, 100 Ind. 63, p. 74; *McDonel v. State*, 90 Ind. 320, p. 327. But we are not to take the instruction apart from the others, and in defining the various degrees of homicide the court had very fully informed the jury in prior instructions what must be proved, and it was not necessary to repeat the information. *Union M. L. Ins. Co. v. Buchanan, supra; Boyle v. State, supra; Goodwin v. State, supra; Browning v. Hight*, 78 Ind. 257.

The other objection urged is that the instruction assumes to state all the facts hypothetically, and omits some that are essential to a conviction. In support of this contention we are referred to *Norton v. State*, 98 Ind. 347, and *Brooks v.*

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State, 90 Ind. 428. But this argument rests on a groundless assumption. The instruction does not assume to state all the facts which the State must prove; on the contrary, it states an abstract principle of law, but one relevant to the case made by the evidence. We have disposed of the objections made to this instruction, and in doing so have decided all the questions which it is proper for us to consider.

A strong and able appeal is made to us to reverse upon the evidence, but this we can not do, for the verdict is supported on every material point. Counsel with vigor and ingenuity insist that the case is one of mistaken identity, and earnestly endeavor to impress upon our minds the liability of witnesses and jurors to err in such matters. We can not agree with counsel that the question is simply one of identity, for it is settled by the uncontradicted testimony of Wallace, Kennedy's confederate, that Kennedy was nearest him when constable Anderson arrested him, and Kennedy's declarations to the Cincinnati policeman tend to show that he was in Greensburg on that day. As Kennedy was with Wallace in the depredations of that day, as he attempted to rescue the latter from arrest, and as he was closely pursued by Baker and Woodfill, there can be but little, if any, doubt that he it was who fired the fatal shot; but when we add to this evidence the testimony of the great number of witnesses who identify—some of them in very positive terms—the appellant as the man who did the shooting, the conviction that he slew Baker is irresistible. If this be so he was justly found guilty of murder.

Judgment affirmed.

Filed April 13, 1885; petition for a rehearing overruled June 18, 1886.

Miller v. The State.

No. 13,042.

MILLER v. THE STATE.

CRIMINAL LAW.—*Indictment.—Grammatical Construction.*—Where a pronoun is used in an indictment, there is no rule of legal or grammatical construction which requires that it shall relate to the last preceding noun, for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed.

SAME.—*Intoxicating Liquor.—Sale to Habitual Drunkard After Notice.—Evidence.*—In a prosecution, under section 2093, R. S. 1881, for selling liquor to a person in the habit of being intoxicated after notice given, where there is no evidence showing that the person named in the affidavit and information was in the habit of being intoxicated, and where there is no evidence that the defendant, either in person or by agent, sold such liquor, a conviction can not be sustained.

From the Fountain Circuit Court.

S. F. Wood, for appellant.

F. T. Hord, Attorney General, H. H. Conley, Prosecuting Attorney, W. B. Hord and W. H. Cox, for the State.

MITCHELL, J.—Section 2093, R. S. 1881, provides that “Whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquor to any person who is in the habit of being intoxicated, after notice shall have been given him, in writing, by any citizen of the township or ward wherein such person resides, that such person is in the habit of being intoxicated, shall be fined,” etc.

The appellant was prosecuted and convicted for a violation of this statute. The affidavit and information charged that John Miller, on a day named, sold intoxicating liquor to one John Stevenson, “who was then and there a person in the habit of being intoxicated, and after notice in writing had been given him, the said John Miller, by Fannie Stevenson, who was then and there a citizen of the township in which he lived, to wit, Troy township, in said county, that said John Stevenson was then and there a person in the habit of being intoxicated.”

The objection to the affidavit and information is, that ac-

Miller v. The State.

ording to proper grammatical construction, the pronoun "he," above italicized, refers to the appellant, Miller, and that the affidavit and information are, therefore, fatally defective, in not averring that the person who gave the notice in writing, concerning Stevenson's habit, was a citizen of the township in which he (Stevenson) resided.

The statute contemplates that the notice in writing shall be given by a citizen of the township or ward wherein the person who is in the habit of being intoxicated resides. *Engle v. State*, 97 Ind. 122.

In the case of *Steeple v. Downing*, 60 Ind. 478, this statement is found: "There is no rule of legal or grammatical construction, which necessarily requires that a pronoun shall relate to the last noun, or nouns, mentioned for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed." Applying this rule to the construction of the language quoted, it is fairly evident that "he" refers to John Stevenson. *State v. Hedge*, 6 Ind. 330. The motion to quash the affidavit and information was properly overruled. •

A bill of exceptions, purporting to contain all the evidence given in the case, is set out in the record. On two material points there is an entire failure in the evidence as it appears in the record to sustain the finding of the court. There is not a syllable of testimony tending to prove that John Stevenson was a person who was in the habit of being intoxicated. No evidence was given on that subject. It was admitted of record that notice in writing had been given the appellant, prior to the date of the alleged sale, by the wife of Stevenson, that he was in the habit of being intoxicated, but to sustain a conviction some proof of the fact that he was so habituated must have been made. In this regard the proof fails wholly. The other point upon which proof is entirely lacking is this: There is a total absence of evidence to show that the appellant at any time, either directly or indirectly, sold, bartered or gave to Stevenson any intoxicating or other

liquor. The extent to which the evidence goes on that subject is, that Stevenson was seen in company with others to drink some liquor in the appellant's saloon, but there is no evidence that the appellant was present, either in person or by an agent or servant, or that he had any knowledge whatever that Stevenson obtained or drank any liquor there. The motion for a new trial should have been sustained.

Judgment reversed.

Filed June 19, 1886.

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No. 13,088.

BIRD v. THE STATE.

CRIMINAL LAW.—*Instruction.*—*Stating Elements of Offence.*—When it is undertaken to state in an instruction all of the elements of the offence necessary to a conviction, the instruction is bad if an essential element is omitted; but where an instruction, partially stating the necessary facts, does not charge that they alone, without reference to other facts and other instructions, will justify a conviction, it is not erroneous.

SAME.—*Duty of Jury to Consider Instructions.*—It is not error to instruct the jury that if they have no well defined opinions or convictions as to what the law is relating to any matter at issue, they should give the instructions of the court a respectful consideration.

SAME.—*Defendant's Testimony.*—*Credibility and Weight.*—Where the defendant testifies in his own behalf, an instruction that in weighing his testimony the jury should not overlook the fact that he is the defendant, and deeply interested in the result of the prosecution, and that his testimony must be consistent with all the other facts and circumstances in evidence, to have a controlling weight, is erroneous.

From the Montgomery Circuit Court.

W. H. Thompson, W. B. Herod and J. West, for appellant.
F. T. Hord, Attorney General, and W. B. Hord, for the State.

ZOLLARS, J.—Appellant was convicted upon a charge of

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grand larceny. He has appealed and brought up the case upon the instructions without the evidence.

Instruction 3½ was as follows: "To convict the defendant the State must prove that the property, or some part thereof, described in the indictment, was taken by the defendant; that at the time it was taken it was the property of William Mc-Ivor; that it was taken in Montgomery county, Indiana, and within two years next preceding the finding of the indictment, which was October 9th, 1885."

It is contended that by this instruction the court assumed to give to the jury all of the facts necessary to be found in order to justify a conviction, and that it is defective in that there was an omission to state that the taking must have been felonious, and that the property taken must have been of some value.

When it is undertaken to state in an instruction all of the elements of the offence necessary to a conviction, and an essential element is omitted, the instruction will be fatally defective. *Hart v. State*, 57 Ind. 102; *Hunter v. State*, 101 Ind. 241.

We do not think, however, that the instruction is fairly open to the objections urged against it. It was stated in the instruction, that to convict the defendant the State must prove certain things, but it was not stated that the proof of those facts would alone justify a conviction, without reference to other facts and other instructions by the court. In the third charge, the jury were properly instructed that the taking must have been felonious, and as to the necessary value of the property taken to constitute grand larceny.

In the fourth charge, the jury were instructed that they were the judges both of the law and of the evidence; that the instructions by the court were advisory merely, and that if they differed with the court as to the law, they might follow their own convictions, and disregard the instructions of the court. The latter part of the instruction of which appellant complains was as follows: "If, however, you have no

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well defined opinion or convictions as to what the law is relating to any particular matter or matters at issue in the case, then, in determining what it is, you should give the instructions of the court respectful consideration."

It is undoubtedly true, that in this State the jury may disregard the instructions of the court in a criminal case, and follow their own convictions, but it must be true, also, that the jury should give to the instructions of the court a respectful consideration in all cases, and especially if they are in doubt as to what the law in the case may be. It is made the duty of the court to instruct the jury. It would seem to follow that the jury should at the least give to the instructions a respectful consideration. *Keiser v. State*, 83 Ind. 234; *Lynch v. State*, 9 Ind. 541; *Powers v. State*, 87 Ind. 144; *Nuzum v. State*, 88 Ind. 599; *Long v. State*, 95 Ind. 481.

The sixth instruction was as follows: "The defendant has testified in his own behalf. In weighing his testimony the fact that he is the defendant, and, therefore, deeply interested in the result of the prosecution, should not be overlooked, but it does not follow that because of his interest you should disregard his testimony or refuse to give him credit. Innocent men are sometimes charged with the commission of grave offences. If the defendant's testimony, when compared with all the other facts and circumstances in evidence, is consistent and harmonious, it may have a controlling weight in deciding the case, but the weight it shall have is a matter left wholly to your consideration and judgment."

This instruction can not be sustained. Very clearly it discredits the testimony of appellant. It is equivalent to telling the jury that it was their duty to keep in mind the fact that appellant was the defendant, and that his testimony, for that reason, could not be taken as of controlling weight, unless consistent with all the facts and circumstances in evidence. The other facts and circumstances, doubtless, were inconsistent with his testimony. Otherwise, his testimony would not have been material to him; and otherwise, doubt-

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less, he would not have been convicted. His testimony, without doubt, was intended to explain, or to meet and overthrow, the adverse facts and circumstances in evidence, and if it could be of controlling weight in the decision of the case only in the event that it was consistent with those facts and circumstances, it could be of no avail to him in the way of a defence. The statute makes the evidence of the accused competent in his own behalf, and when he goes upon the witness stand, he has a right to put his evidence before the jury unprejudiced by any adverse criticism by the court. He has a right to ask that his testimony, alone and unsupported, shall be taken as of controlling weight in the case if the jury think proper, whether it is consistent or inconsistent with all the other facts and circumstances in evidence. It is true, the jury were also instructed that they were the judges of the credibility of the witnesses, including appellant, but, as to him, that must be limited by the portions of the sixth instruction above commented upon. From them, the jury would understand, that while they might judge of his credibility, it was under the injunction to keep in mind that he was the defendant and "deeply interested in the result of the prosecution," and that his evidence could not be of controlling weight in the decision of the case, unless consistent with the facts and circumstances in evidence against him. That appellant was an interested party is a fact that the jury might consider in weighing his testimony, and it would have been proper to instruct them that they might exercise that right, but it was not proper to so instruct them as to impose a consideration of his interest as a duty, and thereby cast discredit upon his testimony in advance, and to destroy the controlling effect of his testimony in advance, unless it should be consistent with the testimony against him.

Without further elaboration, we cite the cases: *Hartford v. State*, 96 Ind. 461 (49 Am. R. 185); *Nelson v. Vorce*, 55 Ind. 455; *Woollen v. Whitacre*, 91 Ind. 502; *Pratt v. State*,

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56 Ind. 179; *Veatch v. State*, 56 Ind. 584 (26 Am. R. 44); *Unruh v. State, ex rel.*, 105 Ind. 117, and cases there cited.

Objections are urged to other instructions, but it is not necessary that they shall be here noticed.

The judgment is reversed, with instructions to the court below to sustain appellant's motion for a new trial.

The warden of the State prison in which appellant is confined will cause him to be delivered into the custody of the jailor of the proper county, to abide the orders of the court below.

Filed June 22, 1886.

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No. 12,537.

HARRIS ET AL. v. CASSADY.

MORTGAGE.—Consideration.—The promise of one to pay a debt for which he is already liable as surety is not a sufficient consideration to support a mortgage.

SAME.—Release of Groundless Claim.—Where a claim is without foundation, a release will not constitute a valid consideration for a mortgage.

From the Clay Circuit Court.

S. C. Stimson, R. B. Stimson, H. D. Roquet, G. A. Knight and C. A. Knight, for appellants.

B. E. Rhoads, E. F. Williams, J. McNutt and J. Q. Cornell, for appellee.

ELLIOTT, J.—The trial court, upon proper request, made the following special finding of facts and stated the following conclusions of law:

"1st. That on the 25th day of February, 1882, Sarah C. Gray recovered a judgment in the Vigo Superior Court for the sum of \$1,059.14, with costs of said suit, against John B. Cassady, Marion K. Cassady, Henry C. Robinson, Alexander

Harris et al. v. Cassady.

Crews and Richard J. Harris, in which judgment it was decreed that the said Robinson, Crews and Harris were sureties for said other defendants, and an order was made therein to exhaust the property of Cassady and Cassady before resort is had to the property of said Robinson, Crews and Harris.

"2d. An execution was issued upon said judgment and placed in the hands of the sheriff of Vigo county, who, on the 1st day of August, 1882, levied said writ upon one Bucyrus Steam Engine and one Runeley Separator, with belts and fixtures combined, which was the property of the defendant in this action, and in which the execution defendants had no interest, which property was turned out to the sheriff by these plaintiffs as the property of the execution defendants.

"3. That on the 24th day of August, 1882, the defendants herein agreed with the plaintiffs to execute a mortgage upon the land now in controversy, in consideration that they would pay said execution and release said levy. And that they would meet at the office of Dunnigan & Stimson, in Terre Haute, on the 26th day of said month to consummate said agreement; that in pursuance of said agreement they did meet on that day, when the defendant refused to consummate said agreement; that afterwards, on the same day, he agreed with Richard Dunnigan, one of the attorneys of these plaintiffs, that he would sign said mortgage, and that the same should not constitute a lien upon his land unless he was enabled to and did redeem certain land of his brother, which had prior thereto been sold at sheriff's sale; that after parting with the said Dunnigan he agreed with Stimson, another of plaintiffs' attorneys, to execute the note and mortgage in suit in pursuance of the original agreement with the plaintiffs, and did execute said mortgage, and agreed to execute the note when these plaintiffs should pay off said execution and release said levy; that upon the delivery of said mortgage to these plaintiffs they did pay off said execution as sureties of the said other execution defendants, which fact appears on said

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execution, and released said levy, but the defendant herein declined and refused to execute said note.

"4th. That the mistake alleged in the complaint exists, and that the same is mutual, and that it occurred through the inadvertence of the scrivener who drew said mortgage.

"5th. That the debt in controversy now amounts to the sum of \$1,294.40.

"And the court finds as conclusions of law on the above facts, that the mortgage in suit is without any consideration, and that the plaintiffs are not entitled to have the same foreclosed against the property therein described; and the court finds for the defendant."

It appears from the special finding that appellants were liable as sureties on the judgment under which the appellee's property was seized, and as they were bound for this judgment they yielded no consideration by the agreement to pay what they were already held liable to pay by the judgment of the court. There was no question as to their liability for the debt they undertook to pay, for that was settled by the judgment in the action brought by Sarah C. Gray. We understand the law to be well settled, that a promise to pay a debt for which the promisor is already bound does not constitute a sufficient consideration to support a contract. *La-boyteaux v. Swigart*, 103 Ind. 596; *Smith v. Boruff*, 75 Ind. 412; *Fensler v. Prather*, 43 Ind. 119; *Ritenour v. Mathews*, 42 Ind. 7; *Reynolds v. Nugent*, 25 Ind. 328. It is evident, therefore, that the promise of the appellants to pay their own debt is not such a consideration as will support the mortgage declared on in this suit.

The special finding shows that the appellee was the absolute owner of the personal property levied on at the instance of the appellants, and, as he was the owner, the sheriff had no right to seize it under a judgment rendered against other persons. It is too clear for argument that the seizure of appellee's property to pay the judgment against the appellants and their principals, was wrongful and illegal. There was,

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according to the statements of the finding, no foundation for the claim asserted against the property of the appellee, and, as there was no foundation for the claim, the release of the levy constituted no consideration for the mortgage. Where a claim is, as here, entirely without foundation, a release will not constitute a valid consideration. *Bridges v. Blake*, 106 Ind. 332; *Warey v. Forst*, 102 Ind. 205; *Smith v. Boruff*, *supra*; *Jarvis v. Sutton*, 3 Ind. 289; *Spahr v. Hollingshead*, 8 Blackf. 415; *Wade v. Simeon*, 2 C. B. 548; *Jones v. Ashburnham*, 4 East, 455; *Cabot v. Haskins*, 3 Pick. 83; *Martin v. Black*, 20 Ala. 309; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; *Davisson v. Ford*, 23 W. Va. 617, *vide* p. 627.

Where there is a dispute, and the claim asserted is not entirely groundless, then a promise to forbear the prosecution of the claim is founded on a sufficient consideration. *Wray v. Chandler*, 64 Ind. 146; *Sanford v. Freeman*, 5 Ind. 129; *Luark v. Malone*, 34 Ind. 444; *Nicewanger v. Bevard*, 17 Ind. 621. It is not necessary that the claim asserted should be a legal one, but it is necessary that it must have some foundation in law or in equity, and here there is no such foundation. If the claim asserted by the appellants appeared to have any foundation, the cases of *Henry v. Ritenour*, 31 Ind. 136, *Cronkhite v. White*, 25 Ind. 418, *Thompson v. Nelson*, 28 Ind. 431, and *Harter v. Johnson*, 16 Ind. 271, would exert an important influence upon the case; but, for the reason that the claim as stated in the special finding appears on its face to be foundationless, these, and kindred cases, have here no controlling influence.

We do not doubt that an agreement by a creditor to release a debtor will constitute a valid consideration for a contract. *Crowder v. Reed*, 80 Ind. 1; *Kester v. Hulman*, 65 Ind. 100. But here there was no release of a debtor; the utmost that can be said is that there was a release of a void levy.

Nor do we doubt that an agreement by a creditor to extend

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the time of payment of a debt is a valid consideration. *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279). In this case there was no agreement to extend the time of payment of a debt, for, as the special finding shows, the only agreement was that the void levy should be released, and that the appellants should pay their own debt.

We can not disturb the finding of the court, as the evidence gives it ample support on all the material points.

Judgment affirmed.

Filed June 19, 1886.

No. 12,480.

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107	162
128	76
107	162
137	395
107	162
148	149
107	162
155	440
155	488
155	656

GRAVEL ROAD.—*County Commissioners.—Changing Time of Meeting of Viewers and Engineer.—Discretion.*—In a proceeding to establish and construct a gravel road, the board of commissioners have discretionary authority to change or extend the time fixed for the meeting of the viewers and engineer.

SAME.—Where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time, in the exercise of a reasonable discretion.

SAME.—*Effect of Failure to Dispose of Cause During Term.—Continuance.*—In all judicial or quasi judicial proceedings, a cause does not lapse or abate on account of a failure to enter a continuance or make some other disposition of it at a term of the court in which it is pending, but it stands continued by operation of law. R. S. 1881, sections 1325, 1326, 1327.

SAME.—*Appeal from Board.—Irregularities in Proceedings not Ground for Dismissal in Circuit Court.*—Where, in a proceeding to establish a gravel road, the board of commissioners properly acquired jurisdiction, mere irregularities in the subsequent proceedings of the board will afford no ground for dismissing the cause on appeal to the circuit court, where the cause stands for trial *de novo*.

From the Carroll Circuit Court.

J. Applegate and *C. R. Pollard*, for appellants.

L. D. Boyd, for appellees.

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NIBLACK, C. J.—Samuel Black and more than one hundred others, all resident freeholders of the county of Carroll, in this State, presented a petition to the board of commissioners of that county at its June term, 1884, praying for the establishment and construction of a gravel road upon a certain route, and between certain points therein specified. The board appointed viewers and an engineer, as required by the statute, and ordered that they should meet and proceed to discharge the duties which had been assigned to them, on the 6th day of October, 1884. No order of continuance, or order of any other kind, was made in the cause at the next regular session, in September, 1884, but at a special session which was held in that month, the board ordered that the time of the meeting of the viewers and engineer should be postponed until the 6th day of November, 1884. The county auditor thereupon notified the viewers and engineer of their appointment, and of the time of their meeting lastly above named, and also gave notice of the time and place of such meeting, by four weeks' publication in a weekly newspaper of the county. On said 6th day of November, 1884, the viewers and engineer met, as they had been notified to do, and, after qualifying as required by law, proceeded to examine the proposed line of road, and, on the 9th day of December, 1884, made a report of their proceedings to the board of commissioners, expressing the opinion, amongst other things, that the contemplated road would be a work of public utility.

Opposition being made to the report thus submitted, and Francis Thomson and others having remonstrated against the construction of the proposed road, the matter was continued until the March term, 1885, of the board, during which term the report was confirmed and an order was entered for the construction of the improvement prayed for in the petition.

Thomson and the other remonstrators appealed from the order made as lastly above stated to the circuit court, in which, at the next succeeding term, they moved to dismiss

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the petition upon the ground that as the time for the meeting of the viewers and engineer was fixed at a time beyond the September session, 1884, of the board of commissioners, and as the board made no order of continuance, or other order in the premises, at that session, the jurisdiction of the board over the subject-matter of the proceeding had lapsed, and that thereafter such jurisdiction had not been in any manner regained by the board.

This motion was sustained by the circuit court, and the petition was dismissed at the costs of the petitioners.

Whether the commissioners have the power, in a case like this, to fix the time at which the viewers and engineer shall meet, at a period beyond their next regular session, is a question not now fairly before us, and hence involves an inquiry upon which we are now not required to enter. The order made at the special session in September then next ensuing, fixing the time of meeting on the 6th day of November, 1884, vacated and superseded the order fixing a previous day of meeting. While the provision of the statute, requiring the board to fix the time at which the viewers and engineer shall meet, is mandatory (see section 5092, R. S. 1881), there is nothing having any connection with that provision from which it may be inferred that the board may not thereafter change the time and fix a different day for the meeting. It has, on the contrary, been held in analogous cases that the time fixed by the board for similar purposes may be changed or enlarged. *Munson v. Blake*, 101 Ind. 78; *Lipes v. Hand*, 104 Ind. 503. In this latter case, which was a proceeding for the drainage of land, it was said that "the court had authority to extend the time of filing the report of the commissioners. It is a familiar rule that where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time," in the exercise of a reasonable discretion, and that rule is applicable to cases like the one under consideration. It is also a familiar rule that in all judicial or quasi judicial proceedings, a cause does not either lapse or

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abate on account of a failure to enter a continuance of it, or to make some other disposition of it, at a term of the court in which it is pending. In case of such a failure the cause stands continued by operation of law. R. S. 1881, sections 1325, 1326, 1327; *McMullen v. State, ex rel.*, 105 Ind. 334.

It is conceded by all parties that the board of commissioners acquired jurisdiction in this case when the petition was filed, and that it consequently had authority to appoint viewers and an engineer in the first instance. However irregular, therefore, the subsequent proceedings may have been, the jurisdiction thus acquired was not lost. *McMullen v. State, ex rel., supra.* Whether regular or irregular, these subsequent proceedings were vacated by the appeal to the circuit court, where the cause stood for trial *de novo*, and not, as in an appellate court, for the review and correction of errors. *Fleming v. Hight*, 95 Ind. 78; *Munson v. Blake, supra.*

Such subsequent proceedings being vacated by the appeal, nothing disclosed by them, whether of omission or commission, afforded any cause for dismissing the petition. *Sunier v. Miller*, 105 Ind. 393.

The judgment dismissing the petition is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed May 22, 1886; petition for a rehearing overruled June 23, 1886.

No. 12,341.

THE SECURITY COMPANY, TRUSTEE, v. BALL.

MORTGAGE.—*Promissory Note.*—*Action to Procure Surrender and Cancellation.*—*Check.*—*Failure of Bank.*—*Liability for Loss.*—B. employed C. & N. to negotiate a loan for him. They applied to D. & Co., who procured the money from their principal, the Security Company, and deposited it in bank. Shortly thereafter, B. executed his note and mortgage for the

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amount and delivered them to D. & Co., who left a check on the bank with N. to be delivered to B. when he had obtained the release of prior encumbrances on his land, which the latter agreed to obtain at a certain date. B. did not carry out his agreement at the time fixed, nor subsequently, and ten days later, while the check was still in the hands of N., the bank failed.

Held, that B. is not liable for the loss, and that he may maintain an action against the Security Company for the surrender and cancellation of the note and mortgage.

From the Rush Circuit Court.

R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

B. L. Smith and W. J. Henley, for appellee.

ZOLLARS, J.—Appellee brought this action to procure the surrender and cancellation of a note and mortgage which appellant holds, the mortgage being of record.

The main ground upon which this relief is asked is, that the note and mortgage were given for a loan of money from appellant which it neglected and refused to furnish after getting the note and mortgage.

The question for decision is raised by the assignment that the court below erred in sustaining a demurrer to appellant's answer.

The facts set up in the answer are, in substance, as follows: In May, 1884, appellee employed Cambern & Newkirk, of Rushville, to negotiate for him a loan of \$3,000, and agreed to secure the same by his promissory note and a mortgage upon his land, and agreed also, that his title to the land should be perfect and free from encumbrances, and that he would furnish an abstract of title to any one who should furnish the money, showing these facts. Through these parties, appellee applied to Thomas C. Day & Co., of Indianapolis, to procure the loan upon the above named terms. These terms were communicated by Day & Co. to appellant, and it at once remitted the money to them to be loaned to appellee, so soon as he should furnish an abstract showing that he was the

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owner of the land, and that his title was free from encumbrances. Day & Co. deposited the money in Fletcher & Sharpe's Bank, at Indianapolis. Appellee furnished to Day & Co. an abstract, which showed that he owned the land, subject to a mortgage of over \$3,000, and a judgment for about \$330. At the time he furnished this abstract he informed them that he was ready at any time to procure a release of the mortgage and judgment, and thus be able to convey a good title whenever appellant should furnish the \$3,000 to be used in paying off the existing mortgage and judgment. In June, 1884, one Griffith, a member of the firm of Day & Co., visited appellee at his farm, and informed him that he had come to make the loan, and had brought a check for the amount upon Fletcher & Sharpe's Bank, to be delivered upon the execution of a note and mortgage by appellee, and a release of the existing mortgage and judgment. The holder of the existing mortgage was present, and expressed a willingness to go to Rushville and cancel his mortgage upon the payment of the amount of it to him. Appellee being busy with his harvest declined to go on that day, but agreed with Griffith, as the agent of appellant, that he would execute the note and mortgage and deliver them to Griffith for appellant, and that Griffith should deliver the check to Newkirk, to be by him delivered to appellee so soon as the existing mortgage and judgment should be released, which appellee agreed should be done on the coming Saturday, the 5th day of July. In accordance with this agreement, appellee executed and delivered the note and mortgage in suit, and Griffith delivered the check of Thomas C. Day & Co. to Newkirk, to be delivered to appellee upon his procuring the other mortgage and the judgment to be released and satisfied. Thereafter, Thomas C. Day & Co. left the check with Newkirk, and kept the money on deposit in Fletcher & Sharpe's Bank to meet it.

If appellee had caused the encumbrances upon his land to be released as agreed, he would have received the check on

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the 5th day of July, and it could have been forwarded to Fletcher & Sharpe's Bank and collected on the following Monday, the 7th day of July. Appellee did not cause the encumbrances to be released on the 5th day of July, nor has he since done so, and hence did not, and has not received the check. So far as the parties knew, Fletcher & Sharpe's Bank was solvent at the time the check was placed in the hands of Newkirk. It continued to meet all demands upon it until the 15th day of July, 1884, when it failed in business and suspended payment. Whether it has since resumed payment, or whether its assets are sufficient to pay the whole, or any part of its liabilities, is not shown by any averment in the answer. It is averred in the answer, as a conclusion, that as appellee did not procure the release of the prior mortgage and the judgment on the 5th day of July, as he had agreed to do, the check after that time "stood and remained" at his risk.

This answer, although the fact is not averred, was drawn upon the theory that by the failure of Fletcher & Sharpe's Bank the deposit was lost, and the check became worthless. Assuming this as a fact, the argument of appellant's counsel is, that if appellee had performed his contract by causing the encumbrances to be released on the 5th day of July, he might have received and collected the check before the failure of the bank; that because he did not thus perform his contract, he should suffer the loss consequent upon that failure; and that, hence, appellant should be allowed to retain and collect the note and mortgage, the same as if it had actually paid the money over to appellee. In this contention counsel invoke the protection of the general rule applicable to bank checks. It is the settled law that the holder or payee of a bank check must present it to the drawee for payment within a reasonable time, and if he fails to do this, and the bank upon which it is drawn in the meantime becomes insolvent, the drawer is relieved from liability, at least *pro tanto*, and the loss must fall upon the holder.

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The delay, under the circumstances of this case, from the 5th to the 15th day of July, would be such a delay as would, under the general rule above stated, throw the loss upon the holder of the check. The loss from which the drawer would be thus relieved, would be the actual loss suffered by the failure of the bank. If that loss should be the entire amount on deposit to meet the check, the drawer would be relieved entirely from liability upon the check. If the bank should pay, or be able to pay one-half, or any other part, of the amount on deposit to meet the check, the exoneration of the drawer would be proportionally less. *Griffin v. Kemp*, 46 Ind. 172; *Henshaw v. Root*, 60 Ind. 220.

If it should be conceded that this principle of the law could in any way be made available in the case in hand, it is clear, we think, that the answer under consideration is not such as to make it available. It is averred that on the 15th day of July the bank failed in business, and suspended payment, but it does not follow from this that appellant suffered any loss. The bank might have failed in business and suspended payment on that day, and yet have had sufficient assets to pay its liabilities in full. It might have failed in business and suspended payment on that day, and yet before this action was commenced it might have recovered entirely from its embarrassment, and have been able to pay its liabilities dollar for dollar. For aught that is averred in the answer, appellant might have recovered from the bank the amount of its deposit, against which the check was drawn; and hence no loss is shown for which appellee can be made liable.

We think it clear, too, that the above principle of the law can not be invoked in appellant's behalf in this case. The check was never delivered to appellee, and hence he could not have presented it for payment. Had he procured the release of the prior encumbrances on the 5th day of July, he could have demanded the check from Newkirk. This he did not do on that day, nor did he at any subsequent time. This

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failure did not, as matter of fact, put the check into his possession or keeping, and, clearly, his failure to do the thing required to entitle him to the possession and ownership of the check did not have the effect of making him the owner of it. He never has been the owner of the check. He never has had the possession, nor has he been entitled to the possession, of the check; hence he could not have presented it for payment. He agreed to make a loan from appellant, and has neglected and failed to do so, by neglecting to furnish an unencumbered title to his land. If appellant had kept the money in its own safe, the measure of its damages for the breach of the contract on the part of appellee clearly would not have been the amount of the money. If appellant had placed the money, instead of the check, in the hands of Newkirk to be paid to appellee upon the release of the prior encumbrances on the 5th day of July, and after that time Newkirk had lost or wasted it, clearly, again, the measure of appellant's damages for the breach of the contract by appellee would not have been the amount of the money thus lost or squandered, because that loss would not have been the natural and probable consequence of the neglect or wrong of appellee, nor such as might have been foreseen in the light of attending circumstances. In such case the neglect or wrong of appellee would not have been the proximate cause of the loss. The loss would have occurred, primarily, from the wrong of Newkirk, and but for his wrong intervening, the loss would not have occurred. Instead of keeping its money in its safe, or placing it in the hands of Newkirk, appellant placed the money in Fletcher & Sharpe's Bank, to be held by it until needed to perfect the loan to appellee. Appellee violated his contract in not freeing his land from the prior encumbrances on the 5th day of July. After that time the bank failed in business, and we assume, what is not alleged, that by this failure appellant lost its money on deposit with the bank. The failure of the bank produced the loss. This failure was the primary and proximate cause of the loss. The failure

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of appellee to keep his contract did not produce this loss. If appellant had kept the money in its own safe, it would not have been lost. Nor did the failure of appellee to keep his contract produce, or conduce to, the failure of the bank. The bank's failure, and the consequent loss to appellant, were not the natural and probable consequences of appellee's neglect or wrong. The failure was an unforeseen, independent and intervening agency, that produced the loss to appellant. The loss resulted from over-confidence on the part of the depositor, and bad banking by the banker, and not from anything that appellee did or failed to do.

Upon any view that may be taken of the case, the court below ruled correctly in sustaining the demurrer to the answer.

The judgment is affirmed, with costs.

Filed June 13, 1885; petition for a rehearing overruled June 23, 1886.

No. 12,600.

CONWELL ET AL. v. TATE ET AL.

107	171
137	294

DRAINAGE.—Remonstrance.—Burden of Issue.—A land-owner, who remonstrates on the single ground that his land is assessed for too much, has the burden of the issue.

From the Howard Circuit Court.

M. Bell and *W. C. Purdum*, for appellants.

J. C. Blacklidge, *W. E. Blacklidge*, *B. C. H. Moon*, *J. W. Kern*, *J. W. Cooper*, *B. F. Harness*, *J. F. Elliott* and *L. J. Kirkpatrick*, for appellees.

ELLIOTT, J.—The appellees, proceeding under the law of 1883, petitioned for a ditch, and the appellants remonstrated. A single cause of remonstrance was stated, namely, the third

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statutory cause, that the lands of appellants were assessed for too much. We think that this remonstrance narrowed the issue to a single question, and that is this: Was the amount of benefits assessed against the appellants' lands too large? The only controverted point, therefore, was as to the amount of the assessment; there was no other issue.

It is asserted by counsel that the case of *Neff v. Reed*, 98 Ind. 341, decides that in such a case as this, the burden is on the petitioners. We do not so understand that case, for there many of the facts essential to the success of the petitioners were controverted by the remonstrance; while here the only point in dispute is as to the amount of the assessment. What we have said of *Neff v. Reed*, *supra*, disposes of the argument built on *Schmied v. Keeney*, 72 Ind. 309.

We regard the case, as to the right to open and close, as governed by the principle decided in the cases of *Evansville, etc., R. R. Co. v. Miller*, 30 Ind. 209, and *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133. In the first of these cases it was said: "Inasmuch as no question but the measure of damages was presented in the circuit court, there was no error, we think, in giving the appellee the right to begin." This doctrine was approved in the case cited and many authorities referred to which fully sustain it. We can perceive no reason why this principle should not apply here, and it certainly is the rule in analogous cases. *In the Matter of John and Cherry Streets*, 19 Wend. 659.

The general rule in cases of this general character is, that only such objections and questions as are presented below will be considered on appeal. *Updegraff v. Palmer*, *post*, p. 181; *Thayer v. Burger*, 100 Ind. 262; *Meranda v. Spurlin*, 100 Ind. 380; *Anderson v. Baker*, 98 Ind. 587; *Higbee v. Peed*, 98 Ind. 420. These cases establish the rule that the issue is that joined in the trial court, and it was held in *Reed v. Brenneman*, 89 Ind. 252, that upon such an issue as that here joined, the land-owner has the burden. This is in accordance with the principle declared in *Evansville, etc., R. R.*

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Co. v. Miller, supra; Indiana, etc., R. W. Co. v. Cook, supra.
 Upon these authorities it must be held that the trial court did right in holding that the appellants should open and close the case.

Judgment affirmed.

Filed June 23, 1886.

No. 12,102.

MARSHALL, ADMINISTRATOR, v. THE STATE, EX REL.
 SHRYER.

CERTIFICATE.—*Official Signature.*—No certificate, whether in a judicial or other legal proceeding, is complete without the signature of the officer required by law to make the attestation.

BILL OF EXCEPTIONS.—*Long-hand Manuscript of Reporter.*—The original long-hand manuscript of the evidence, as prepared by the official stenographer and certified by him, does not of itself constitute a bill of exceptions. It can only be certified to the Supreme Court in its original form, by being incorporated in a bill of exceptions. R. S. 1881, section 1410.

From the Vigo Circuit Court.

I. N. Pierce, T. W. Harper and B. V. Marshall, for appellant.

C. F. McNutt, J. G. McNutt, J. T. Hays and H. J. Hays, for appellee.

NIBLACK, C. J.—This was in form an action by the State, on the relation of Rosa H. Shryer, against Buena V. Marshall, administrator of the estate of Sarah L. O'Boyle, deceased, late guardian of the relatrix, upon the bond executed by the decedent as such guardian, but was really a claim filed by the relatrix against the estate of the said Sarah L. O'Boyle for an alleged balance due to the former from such estate upon a proper and final settlement of the guardianship.

Answer in general denial, accompanied by an agreement

107	173
188	290
107	173
140	290
141	276

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that all proper matters of defence might be given in evidence without being specially pleaded.

The circuit court, after hearing the evidence, found that there was due from the estate to the relatrix the sum of \$1,-907, assessing, also, against the estate the additional sum of \$190 as a penalty for the failure of the decedent in her lifetime to account to the relatrix for the full amount in her hands as guardian as above stated, and, after overruling a motion for a new trial, rendered judgment upon the finding against the estate for the aggregate sum of \$2,097, and costs of suit. Error is assigned only upon the refusal of the circuit court to grant a new trial.

Counsel for the appellee make the point that the record is so defective that no question arises upon it for decision in this court, and particularly that the document copied into, or rather annexed to, the transcript, and purporting to be a bill of exceptions, has never been made, and hence, in legal contemplation, is not a part of the record relied upon in support of this appeal.

The memorandum in writing found in the transcript, and assuming to be a record entry of the trial, notes the swearing of Fannie W. Hamill as short-hand reporter to report the evidence in the cause. On the 18th day of April, 1884, the day on which the motion for a new trial was overruled, and following the order overruling that motion, an entry in these words appears: "And afterwards, on said day, said defendant filed in the clerk's office the original long-hand report of the evidence, as copied and reported by Fannie W. Hamill, official reporter, duly sworn and qualified, which said long-hand report is hereto attached as defendant's bill of exceptions herein." Then following the final judgment, and matters incident to it, the clerk of the court below, or some one else assuming to act for him, has written into the transcript these words:

"STATE OF INDIANA, VIGO COUNTY, ss.:

"I, Morrill N. Smith, clerk of the Vigo Circuit Court, in

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and for said county and State, do hereby certify that the above and foregoing is a full, true and complete transcript of the record of the above entitled cause, and that the annexed bill of exceptions is the original long-hand report of the evidence as furnished by said Fannie W. Hamill, reporter appointed by the court.

“In witness whereof I have hereunto set my hand
[L. S.] and affixed the seal of said court at Terre Haute,
this 16th day of August, A. D. 1884.”

This assumed verification of the transcript has the seal of the Vigo Circuit Court attached, but is not signed by the clerk. Following, and annexed to the foregoing, is a voluminous document purporting to be a *verbatim* report of the evidence given at the trial, interspersed with memorandums of decisions made, and of exceptions reserved upon certain questions arising during the progress of the trial. To that is attached a certificate of the reporter that it is a full, true and complete transcript of the evidence as taken by her in the cause in short-hand and as written out by her as required by law; also, a statement in writing, signed by the judge, that it contains all the evidence given in the cause. These are immediately and only succeeded by a blank certificate, apparently prepared for the signature of the clerk of the Vigo Circuit Court, but not signed by him, that the document in question is the original long-hand report of the evidence adduced at the trial of the cause, taken and transcribed by Fannie W. Hamill, reporter appointed by the court, and that said report was filed in his office on the 18th day of April, A. D. 1884.

The record in this case is materially defective, and, in consequence, presents no question for our decision involving the merits of the appeal: *First.* Because it is not certified to us as contemplated by sections 649 and 650, R. S. 1881. *Secondly.* Because neither the evidence nor questions sought to be reserved upon it at the trial, are properly in the record,

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conceding both of the blank certificates to have been signed by the clerk, as it was doubtless intended they should have been.

No certificate, whether in a judicial or other legal proceeding, is complete without the signature of the officer required by law to make attestation by his certificate.

The original long-hand manuscript of the evidence, however elaborately certified, does not of itself constitute a bill of exceptions in a cause. It can only be certified to this court in its original form, by being incorporated in a bill of exceptions. R. S. 1881, section 1410. In this case the long-hand manuscript of the evidence was not incorporated into, or in any manner made a part of, a bill of exceptions. The intention, as well as the effort, seems rather to have been to make such manuscript take the place of and serve as a bill of exceptions. This did not make it a part of the record, or authorize the clerk below to certify it to this court as a bill of exceptions. *Goodwine v. Crane*, 41 Ind. 335; *Reid v. Houston*, 49 Ind. 181; *Galvin v. State, ex rel.*, 56 Ind. 51; *Scot-ten v. Divilbiss*, 60 Ind. 37; *Sidener v. Davis*, 69 Ind. 336; *Woollen v. Wishmier*, 70 Ind. 108; *Irwin v. Smith*, 72 Ind. 482; *City of Delphi v. Lowery*, 74 Ind. 520; *Lee v. State, ex rel.*, 88 Ind. 256; *Brehm v. State*, 90 Ind. 140; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245; *Wabash, etc., R. W. Co. v. Tretts*, 96 Ind. 450; *Dennis v. State*, 103 Ind. 142; *Lowery v. Carver*, 104 Ind. 447.

If, therefore, the clerk had signed both of the blank certificates, herein above referred to, neither the evidence nor any question reserved at the trial would be in the record. Nor would any question upon the regularity of the proceedings at the trial be presented, since all of the causes assigned for a new trial rest upon matters which could only be verified by a bill of exceptions.

The judgment is affirmed with costs.

Filed April 13, 1886; petition for a rehearing overruled June 23, 1886.

Gray v. The State.

No. 13,185.

GRAY v. THE STATE.

107 177
184 90

CRIMINAL LAW.—Plea of Guilty.—Sentence.—Duty of Court.—After a plea of guilty to a criminal charge by one of legal age, it is the duty of the court to either sentence him at the time or to place him in the custody of the sheriff until sentence.

SAME.—Prosecuting Attorney.—Sustaining Prosecution.—Illegal Agreement with Defendant.—The prosecuting attorney, after the entry of a plea of guilty, can not, with or without the consent of the court, lawfully agree with the defendant that he may depart from court without sentence, subject to rearrest and sentence if he shall commit another offence of a similar character.

From the Marion Criminal Court.

J. C. Denny and *J. M. Cropsey*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

Howk, C. J.—On the 11th day of February, 1886, the appellant and two other persons were jointly indicted, in the court below, for the unlawful sale to one Henry Holmes of "one share, chance and opportunity to draw in a certain lottery scheme and gift enterprise, for the division of personal property," etc. It is shown by the record that on the 2d day of March, 1886, the appellant Gray, and his co-defendants, appeared in person and by counsel in open court, and having been arraigned on such indictment, for plea thereto each of them said that he was guilty, as therein charged. The record shows no other or further action or proceeding in the cause until the 1st day of June, 1886, on which day it is shown that the prosecuting attorney and appellant Gray appeared in open court, and upon appellant's plea of guilty, theretofore entered in this case, it was adjudged by the court that he make his fine to the State in the sum of five hundred dollars, and pay the costs of this prosecution, and that he stand committed to the work-house until such fine and costs were paid or replevied.

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Thereupon, appellant's motions for a new trial, and in arrest of judgment, having been severally overruled, he appealed from the judgment below to this court.

It is shown by a bill of exceptions appearing in the record, that on the 26th day of May, 1886, on motion of the prosecuting attorney, the court entered an order in this cause that a writ be issued for the arrest of appellant Gray, who was then apparently at large with the consent of the officers of the court. Such a writ was issued, and appellant was arrested and brought into court, on the 1st day of June, 1886. He then moved the court for his discharge, "because no specific charge or charges in writing, or breach of any order or rule of court, or any offence, had been filed against him, in writing or otherwise," which motion was overruled by the court, and he at the time excepted. He then "moved the court to compel the prosecuting attorney to file specific charges against him herein," which motion was overruled, and he excepted. An agreement was then entered into, in open court, between the parties to this prosecution, substantially as follows:

On the — day of ———, 1886, an agreement was entered into by this court, Honorable Pierce Norton, judge, presiding, Honorable William N. Harding, prosecuting attorney of such court, and James A. Gray, this defendant, which agreement was then and there, in substance, as follows:

"Before entering upon the trial and investigation of this cause, it was in open court agreed that at the January term, 1886, of this court, on March 2d, 1886, — indictments were returned by the grand jury of Marion county into the court against James W. Gray and others, and that, in each indictment, he was charged with illegally selling a share in a lottery scheme and gift enterprise. Indictment No. 18,905 is the indictment in this case, and the indictments numbered 18,905, 18,906 and 18,907, each, charge a sale of a ticket to the same person, on the same day, and for the same price; that it was then and there agreed that if this defendant would plead guilty to — said indictments, the fines assessed should

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be three thousand dollars (which fines and costs were paid); that on the 2d day of March, 1886, a plea of guilty was entered in causes numbered 18,905, 18,906 and 18,907, and the defendant Gray was permitted to depart from the court, without judgment being passed on said plea of guilty; and the causes so stood on the docket until the 1st day of June, 1886, when the defendant was brought into court and sentenced; that said indictments 18,905, 18,906 and 18,907 should not be prosecuted unless said Gray should resume said lottery business, or engage in said business by himself, or through agents employed by him. It was also agreed that said Gray might use and occupy the rooms, used by him in said lottery business, being rooms 26 and 27 in the Sentinel Building, together with the furniture and fixtures therein, provided the same were not used for lottery purposes; and that, upon these agreements and none other, the said pleas of guilty are entered in said several indictments."

This agreement was signed by "William N. Harding, Pros. Att'y," and by "Denny and Cropsey, Att'ys for defendant."

Oral evidence was then introduced, apparently by the State, for the purpose of showing that since March 2d, 1886, appellant had unlawfully engaged in the lottery business; and then appellant testified positively, in his own behalf, that since the day last named he had not, in any manner, engaged in the lottery business.

Upon the record of this cause thus made up, appellant has assigned a number of errors. Without special reference to these errors, it seems to us that the important and controlling questions in this case presented for our decision are dependent upon the validity or invalidity of the agreement above quoted, between the appellant and the prosecuting attorney, with the sanction and approval of the court. If this agreement was valid and binding on the State, the judgment against appellant ought not to be allowed to stand; because the evidence wholly failed to show that he had, in any manner, violated the stipulations of such agreement to be by him kept

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and observed. But if, as the attorney general claims, "such agreement was illegal and void," because "it was an effort to compound, discontinue or delay a prosecution, which is forbidden by the statute, and made a crime (section 2013, R. S. 1881)," then it would seem to us that the record failed to show any such error in the proceedings of the court as would authorize or justify the reversal of the judgment.

We are of opinion, however, that the agreement quoted was not only unauthorized by law, but that it was in direct contravention of the express provisions of an imperative section of the statute. Thus, in section 1767, R. S. 1881, it is expressly provided that "If the accused plead guilty, such plea shall be entered on the minutes, and he shall be sentenced, or he may be placed in the custody of the sheriff until sentence." It is true that in the same section the court is authorized in its discretion, if the accused is under the age of twenty-one years, to order that he be released during good behavior; but it was not shown, nor is it claimed in the case in hand, that appellant Gray was under the age of twenty-one years. After appellant entered his plea of guilty to the indictment in this case, the court could not lawfully do anything further therein except either to sentence him at the time, or to place him in the custody of the sheriff until such sentence. Nor could the prosecuting attorney, after the entry of such plea by appellant, with or without the consent of the court, lawfully agree with him that he might depart from court without sentence, subject to arrest herein if, in the future, he should commit another offence of a similar character, or during good behavior. *Smith v. Hess*, 91 Ind. 424.

There were some irregularities in the proceedings of the court in the cause under consideration, but the record discloses no error which would justify the reversing of the judgment.

The judgment is affirmed, with costs.

Filed June 23, 1886.

Updegraff v. Palmer et al.

No. 11,962.

UPDEGRAFF v. PALMER ET AL.

DRAINAGE.—*Ditch Extending into Two Counties.*—*Jurisdiction.*—Where a ditch extends into or through two counties, proceedings to establish it may be prosecuted in either.

SAME.—*Notice.*—*Law of 1881.*—Where a drainage proceeding was commenced under the law of 1881, it was proper to give notice of the time of filing the petition.

SAME.—*Appearance.*—*Remonstrance.*—*Practice.*—Where parties appear and remonstrate, they will be confined to the grounds of objection stated in their remonstrance.

SAME.—*Notice.*—*Assumption of Jurisdiction.*—The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient.

SAME.—*Reference to Commissioners.*—*Objections to, When too Late.*—After the drainage commissioners have made their report, and an order is entered approving it and establishing the ditch, it is too late to object to the reference to such commissioners.

SAME.—*Affidavit.*—*Notary Public.*—*Jurat.*—*Omission of Month.*—A petition for drainage may be sworn to before a notary public, and the mere omission of the month from the jurat will not render the verification bad.

SAME.—*Filing of Petition.*—*Conclusiveness of Judgment.*—A judgment entered upon a petition for drainage is conclusive that the petition was duly filed.

SAME.—*Dismissal of Petition.*—The fact that the report of the commissioners is invalid, or that the orders of the court based thereon are erroneous, will not supply grounds for dismissing the petition.

From the Cass Circuit Court.

J. C. Nelson, Q. A. Myers and H. C. Thornton, for appellant.

D. C. Justice, for appellees.

ELLIOTT, J.—The appellant petitioned the Cass Circuit Court to establish a ditch, and to assess benefits and damages. The court dismissed the petition.

The fact that the proposed ditch extended into Carroll county did not deprive the Cass Circuit Court of jurisdiction, as part of the ditch will, if established, be within Cass county. It is settled that if a ditch extends into or through two counties, proceedings may be prosecuted in either one of

107	181
128	147
107	181
128	147

107	181
128	147
107	181
128	147

107	181
149	599

107	181
158	163
158	386

107	181
170	471
170	613

107	181
171	46

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the counties. *Shaw v. State, etc.*, 97 Ind. 23; *Crist v. State, ex rel.*, 97 Ind. 389; *Buchanan v. Rader*, 97 Ind. 605; *Meranda v. Spurlin*, 100 Ind. 380.

The fact that the ditch, described in appellant's petition, extends into Carroll county, did not, therefore, warrant a dismissal of the proceedings.

The appellant's petition was filed on the 1st day of January, 1883, so that the proceedings are governed by the law of 1881, and not by the statute of 1883. Under the law of 1881, it was proper to give notice of the time of filing the petition. *McMullen v. State, ex rel.*, 105 Ind. 334. This was the notice given by the appellant.

The notice is substantially in the form prescribed by statute, and proof of posting was made by affidavit. The appellees appeared and filed a remonstrance, but did not challenge the sufficiency of the notice, nor did they question the method of service nor the character of the proof. By thus appearing without objection, they waived these questions. *Higbee v. Peed*, 98 Ind. 420; *Bradley v. City of Frankfort*, 99 Ind. 417; *Sunier v. Miller*, 105 Ind. 393, and authorities cited.

We have many decisions in highway cases holding that where parties appear and remonstrate, they will be confined to the grounds of objection stated in their remonstrance. This long settled rule is a reasonable and just one, for it enables the trial court and parties to correct errors, thus repressing litigation. If the question were an open one we should not be inclined to a different view from that which has so long prevailed, but as the question is well settled we need not now discuss it. *Jackson v. State, etc.*, 104 Ind. 516, and authorities cited.

The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient. *Jackson v. State, etc.*, *supra*; *Carr v. State, etc.*, 103 Ind. 548; *Platter v.*

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Board, etc., 103 Ind. 360; *Cauldwell v. Curry*, 93 Ind. 363; *Board, etc., Hall*, 70 Ind. 469. ·

The record in this case shows that the court did assume jurisdiction and did exercise judicial authority over the parties and the subject-matter.

On the 2d day of July, 1883, the appellees appeared and filed objections to the reference of the petition to the drainage commissioners, stating the following grounds for the motion: 1st. The reference is not authorized by law. 2d. The petition has never been filed or placed upon the docket. 3d. The reference is not authorized by section 2 of the act of March 8th, 1883, inasmuch as the petitioner has not noted thereon the day set for docketing thereof. Prior to the filing of this motion, January 9th, 1883, the drainage commissioners filed bonds which were approved by the court, and one of them took the oath required by law. On the 5th of February, 1883, the report of the commissioner was made to the court and an order entered approving the report and establishing the ditch. The decisions very clearly declare that the motion of the appellees came too late to be of avail. *Smith v. Smith*, 97 Ind. 273; *Carr v. State, etc., supra*.

The general statement in the motion, that the reference is not authorized by law, is too general to present any question for our consideration. In such cases as this the objections must be specifically stated. *Meranda v. Spurlin, supra*; *Higbee v. Peed, supra*; *Anderson v. Baker*, 98 Ind. 587.

On the 15th day of March, 1883, the appellees moved to vacate the judgment rendered by the court, and to set aside the report of the commissioners, assigning various reasons in support of their motion. Many of these reasons are too general to be entitled to consideration, and the others present no questions relevant to the present inquiry, for it must be remembered that the question here is, not whether it was proper to set aside the report or vacate the judgment, but whether it was proper to dismiss the proceedings? The ruling complained of is the dismissal of the proceedings, and

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that is the question for our decision. Counsel wander from the point, and assail the proceedings generally, but this can not avail for the reason that there is but one controlling question involved in the controversy. Confining our discussion to the issue between the contestants, we shall examine only the points which bear upon that issue, and these are presented, so far as they are presented at all, by the motion made on the 13th day of September, 1883. It was on this motion that the court entered judgment dismissing the petition.

There are several reasons assigned in this motion which are too general to present any question, and we pass them without further comment.

The third reason assigned is that the petition is insufficient to authorize the establishment of the said ditch. The appellees had, as we have seen, moved to set aside the judgment of the court approving the report of the commissioner, and it now remains to add that this motion was so far sustained as to vacate the judgment and set aside the report, and the motion under immediate mention was addressed to the second report. It was, therefore, not until one report and the judgment approving it had been set aside and another report made that the petition was assailed. The objection made to the sufficiency of the petition is that it is not properly verified, and we will examine this question, although we are strongly inclined to the opinion that the specification in the motion does not properly present the question. The record contains these recitals, and they appear immediately below the petition, which is signed by the appellant:

"STATE OF INDIANA, CASS COUNTY, ss.:

"John P. B. Updegraff swears and says that the matters alleged above are true as he believes.

"JOHN P. B. UPDEGRAFF.

"Sworn and subscribed 13th, 1883.

{ NOTARIAL }
 { SEAL. }

"HENRY C. THORNTON,
 "Notary Public."

It seems quite clear to us that these recitals show that the

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petition was duly verified. *Shields v. McMahan*, 101 Ind. 591.

A notary public has authority to administer oaths "pertaining to all matters where an oath is required." R. S. 1881, section 6010. Indeed, a still broader authority is conferred by section 5964, for it is there enacted that "every notary public shall have power to administer oaths generally."

The record shows that the petition was filed, and it certainly does appear that the appellees treated it as filed, as did the court, for it entered judgment upon it although it subsequently vacated this judgment and again referred the petition to the commissioner. It is clear that the objection would be unavailing, coming as late as it did, even if the record did not show a filing, as the statute declares that "such judgment shall be conclusive that all prior proceedings were regular and according to law." This provision has often been applied to cases similar to the present. *Scott v. Brackett*, 89 Ind. 413; *Albertson v. State, ex rel.*, 95 Ind. 432; *Albertson v. State, ex rel.*, 95 Ind. 370; *McKinney v. State, etc.*, 101 Ind. 355; *Lipes v. Hand*, 104 Ind. 503.

The fact that the report of the commissioners is invalid, or that the orders of the court based thereon are erroneous, will not supply grounds for dismissing the petition. *Williams v. Stevenson*, 103 Ind. 243; *Sunier v. Miller*, 105 Ind. 393.

Judgment reversed, with instructions to set aside the order dismissing the appellant's petition.

Filed April 20, 1886; petition for a rehearing overruled June 23, 1886.

No. 12,755.

STEPHENS v. THE STATE.

CRIMINAL LAW.—*No Common Law Offences in this State.*—There are no common law offences in this State, and there can not be a conviction for any offence which is not defined by statute. Section 237, R. S. 1881.

SAME.—*Indecent Liberties with Girl Under Twelve Years of Age.*—*Assault.*—

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134	84

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Consent.—Indictable Offence.—Statute Construed.—One who merely takes indecent liberties with a girl under twelve years of age, with her consent, but upon her refusal to consent to sexual intercourse desists, is not, under existing statutes, guilty of an indictable offence, the girl having sufficient intelligence to understand the nature of his conduct. Sections 1909 and 1917, R. S. 1881, are construed.

ELLIOTT, J., dissents.

From the Tippecanoe Circuit Court.

R. P. DeHart, J. R. Coffroth and T. A. Stuart, for appellant.
F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a prosecution against the appellant, David Stephens, upon an indictment containing two counts. The first count charged the appellant with having made an attempt to commit a violent injury upon one Annie Myers, a female child under twelve years of age, with intent to feloniously ravish and carnally know her the said Annie.

The second count charged substantially the same offence, giving only the details of the alleged transaction with greater particularity.

A jury found the appellant guilty as charged, and he was adjudged to pay a fine of \$25 and to be imprisoned in the State's prison for the term of ten years.

The evidence tended to show that Annie Myers, the prosecuting witness, was a female child between eleven and twelve years of age, and was a good deal upon the street, voluntarily soliciting contributions for the support of herself and her mother; that she did not know the appellant by name, yet she had frequently seen him upon the streets of the city of Lafayette, and had sometimes spoken to him; that at the foot of Brown street, in that city, there is a bridge across the Wabash river, known as the Brown Street Bridge; that during an afternoon in July, 1885, the appellant met Annie Myers, above named, on a street not far from the Brown street bridge, and solicited her to go to the Brown street bridge with him, promising to give her a nickel if she would go; that she at first declining, he, the second time, urged and

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coaxed her to go, again promising to give her a nickel if she would consent to go; that she thereupon consented to go, and went to and into the bridge; that the appellant soon followed, and, after entering the bridge, opened his pantaloons and exposing his private parts to the child, had her place her hand upon that part of his body; that he then hugged and fondled the child, at the same time raising her clothes in front and pressing his private parts against her body; that, in this position, he solicited her to permit him to have sexual intercourse with her, but she would not consent; that dallying in this way for a few moments, he desisted from further liberties, gave the child a nickel and went away; that everything that was done at the time was with the consent of the child, she objecting only to the proposed sexual intercourse which the appellant did not urgently insist upon, and which he did not, in any manner, accomplish.

Section 1917 of the last revision of the statutes of this State, declares that, "Whoever unlawfully has carnal knowledge of a woman forcibly against her will, or of a female child under twelve years of age, is guilty of rape, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than five years."

It was previously provided by section 1909 of the same revision of the statutes, that, "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall, upon conviction thereof, be imprisoned in the State prison not more than fourteen years nor less than two years, and be fined not exceeding two thousand dollars."

Although the indictment in this case was formally based upon this latter section, a proper decision of this appeal involves, to some extent at least, a construction of both sections of the statutes above set out.

It was enacted in 1852 as a part of our revised system of laws, passed during that year, that thereafter "Crimes and misdemeanors shall be defined, and punishment therefor fixed

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by statutes of this State, and not otherwise," and that provision of law still continues in force. R. S. 1881, section 237. In giving a construction to that enactment, it has been uniformly held that we have no longer any common law offences in this State, and that however immoral, reprehensible or revolting an act may be, it can not be punished either as a crime or misdemeanor unless it has been defined and declared to be either the one or the other by some statute. *Rosenbaum v. State*, 4 Ind. 599; *Hackney v. State*, 8 Ind. 494; *Dillon v. State*, 9 Ind. 408; *Beal v. State*, 15 Ind. 378; *State v. Ohio, etc., R. R. Co.*, 23 Ind. 362; *Jones v. State*, 59 Ind. 229.

Unless, therefore, it was made to appear by the evidence that the appellant, in what he did, violated some express statutory provision, his conviction of the offence with which he was charged can not be sustained.

Both counts of the indictment, in legal effect, charged the appellant with having made an assault upon the prosecuting witness, with the intention of committing a rape upon her. It was, therefore, incumbent upon the State to prove that, at the time to which the evidence had relation, the appellant had the *intention* of committing a rape upon the prosecuting witness, and that he at the same time made an *assault* upon her in pursuance of that *intention*.

It is conceded that if the appellant had persisted, and had succeeded in having sexual intercourse with the prosecuting witness, he would have been guilty of rape. The fair inference, too, from the evidence was that he desired to have such sexual intercourse, and probably would have consummated his desire if circumstances had proved to be, in all respects, favorable to such a result. But to entitle the State to maintain a prosecution for an *evil intention*, some concurring act must have followed the *unlawful thought*. As in contract, so in tort or crime, a mere unexecuted *intention* does not bind or commit the person who conceives or indulges it. *Parmlee v. Sloan*, 37 Ind. 469, 482; 1 Bishop Crim. Law, sec-

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tion 204 ; *Clements v. State*, 50 Ala. 117. So, if a party abandon his *evil intention* at any time before so much of the act is done as constitutes a crime, such abandonment takes from what has been done its indictable quality. 1 Bishop Crim. Law, sections 208*a* and 733.

Applying the law, as stated, to so much of the evidence as tended to disclose an *intention* on the part of the appellant to have sexual intercourse with the prosecuting witness, the question remains, did the appellant commit an *assault* upon the prosecuting witness, within the meaning of section 1909 of the statutes herein above set forth?

Whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault (R. S. 1881, section 1910), and this implies an unwillingness, or want of consent, on the part of the party assailed.

The question as to whether a female child, under the age which disqualifies her from assenting to sexual intercourse, may so far consent to the taking of improper and indecent liberties with her person, as to relieve such liberties of their unlawful and indictable character, is one which has received some attention both in England and in this country, but is a subject upon which the authorities are not numerous and are very considerably in conflict. But the difference between the statutes, or systems of jurisprudence, upon which some of the decided cases rest, is sufficient to account for the conflicting conclusions respectively reached by them.

At common law an attempt to commit a rape was a misdemeanor only, and Bishop on Statutory Crimes, at section 496, says that "by the better judicial determinations, there can not be, under the common law rules, an assault with intent to have the criminal carnal knowledge of a girl with her consent; because, by the common law, violence consented to is not an assault, and the statute which makes her consent immaterial in defence of the carnal knowledge does not extend also to the assault."

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The same author, continuing through sections 498 and 499, further says: "Some of our American courts, without express statutory aid, have held that the girl's legal incapacity to consent to the carnal act extends also to render her incapable of consenting to the violence which, in the absence of her consent, would by all be deemed to constitute an indecent assault. So that, by these opinions, there may be a conviction for assault with intent to commit carnal abuse. Still, though, by what we have seen to be the better doctrine, the law does not term this act an assault, by reason of the girl's consent. * * * * But in a State where there are no common law crimes, it is not so indictable; and, in the absence of a statute to meet the case, the offender must escape."

The doctrine thus announced by Bishop is well supported in general terms by the cases of *Smith v. State*, 12 Ohio St. 466, *State v. Pickett*, 11 Nev. 255 (21 Am. R. 754), *Regina v. Connolly*, 26 Upper Canada Queen's Bench, 317, *Regina v. Mehegan*, 7 Cox Crim. Cases, 145, *Cliver v. State*, 45 N. J. Law, 46, and, as we believe, by the decisive weight of authority.

As holding a contrary doctrine, see the cases of *People v. McDonald*, 9 Mich. 149; *Hays v. People*, 1 Hill, 351; *Regina v. Beale*, L. R. 1 Crown Cases, 10; *State v. Johnston*, 76 N. C. 209.

All these last named cases were, however, decided under statutes differing in some respects from ours, to which we have referred, and upon facts distinguishable from those now before us, and hence we do not regard those cases as of controlling authority in this cause.

In England, a statute was passed in 1880, which makes it "no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency," and some of the States in this country have statutes more or less similar, but, doubtless through inadvertence, we have no statute changing the common law rule, as herein above stated, on

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the subject of the mere indecent abuse of children, and, for that reason, the doctrine announced on that subject by Bishop, as above, is applicable to the condition of affairs now existing in this State. Still, in respect to the evidence on the question of an assault, the tender years, the inexperience and the subjection of the child will be taken into the account, and often a very small circumstance will be permitted to overcome the child's apparent consent.

In the present case, it was shown by the evidence that the prosecuting witness had sufficient intelligence to understand the nature of the liberties which the appellant took with her, and to realize the extent to which such liberties could be indulged without absolute physical injury.

In our opinion, therefore, the evidence failed to show an assault upon the prosecuting witness within the meaning of the statute defining felonious assaults.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the necessary notice for a return of the prisoner.

ELLIOTT, J., dissents.

Filed June 25, 1886.

No. 12,373.

HOPKINS ET AL. v. HUDSON ET AL.

COAL MINES.—*Miner's Lien.*—*Interest to Which Lien Attaches.*—*Lessor and Lessee.*—*Statute Construed.*—The lien which section 5471, R. S. 1881, imposes in favor of persons employed in and about coal mines, applies only to such interest or estate as the person operating the mine has therein. It does not bind the property of a lessor.

From the Warrick Circuit Court.

A. Gilchrist and C. A. DeBruler, for appellants.

W. M. Hoggatt and A. J. Rutledge, for appellees.

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MITCHELL, J.—William Hudson and fifty-five others joined in an action against Charles F. Hopkins and others, to recover certain sums due each of the plaintiffs from one Irby W. Poor, who was also a defendant, for work done in a coal mine of which Poor was the lessee. The specific relief asked against the appellants was the enforcement of an alleged lien on certain fixtures, machinery and other property belonging to them, and which had been leased and used by Poor in connection with the mine. The complaint alleged that the appellants owned certain real estate in Warrick county, and that they had leased a coal mine situate thereon to John D. Love and another, for a term of five years, from February 1st, 1880.

The lease, by various assignments, the complaint alleged, had been finally transferred to Poor, who operated the mine during the months of March and April, in the year 1884. During these months Poor became indebted to the several plaintiffs, who were his employees, working in the mines, in various sums, for the amount of which each, within sixty days from the time the work was done, gave notice, as the law required, of his intention to hold a lien on the coal mine, machinery, fixtures, and property of every description, which was used in and about the operating of the mines. A demurrer was overruled to the complaint.

Hopkins and the other appellants answered that they were the owners in fee of the land on which the mine was situate, and the absolute owners of all the property described in the complaint, and upon which the plaintiffs were seeking to enforce a lien. They averred that being so the owners they had leased the mine, machinery and fixtures, as alleged in the complaint, for a period of five years from February 1st, 1880, to February 1st, 1885, and that upon the expiration of the lease they had taken possession of the mine, and other property pertaining thereto as their own. The answer further avers that the appellants were the sole owners of the property sought to be affected by the alleged lien, since a date long

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anterior to the claim of the plaintiffs; that the appellants never employed any of the plaintiffs to work for them; that they had nothing to do with the operating of the mine during the time the plaintiffs were employed therein; and that all the work on account of which the liens are claimed was rendered to Poor while he was operating the mine as lessee, and who had no other interest in it, or the machinery and fixtures, except as such lessee.

The court sustained a demurrer to this answer. Such further proceedings were had as resulted in a decree foreclosing the alleged lien on the machinery, etc.

The question for consideration arises upon the complaint and answer, and is this: Does the lien created by section 5471, R. S. 1881, in favor of persons employed in and about coal mines, attach to, and bind the estate of the owner of the mine, machinery, fixtures, etc., without regard to the fact that such owner may have leased the whole to another, who hired the employees, and from whom the wages sought to be made a lien are due, and who had, at the time the laborers were employed and the work done, no other interest in the property except that of a lessee? The appellants contend that it does not. The appellees have not favored us with a brief.

That part of the section above referred to which creates the lien is as follows:

“In all coal mines in this State, the miners and other persons employed and working in and about the mines, and the owners of the land and others interested in the rental or royalty on the coal mined therein, shall have a lien on said mine and all machinery and fixtures connected therewith, including scales, coal-bank cars, and everything used in and about the mine, for work and labor performed within two months, and the owner of the land, for royalty on coal taken out from under his land, for any length of time not exceeding two months,” etc.

The section provides further, that such liens shall have

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priority over all others, except that of the State for taxes, and that the lien for labor shall have priority over that for royalty. It also makes provision for giving notice of an intention to hold a lien by filing a written notice in the recorder's office.

A consideration of this section discloses that a lien is imposed on the mine and all machinery and fixtures connected therewith, in favor of the owner of the land, and others interested in receiving rents or royalty on coal mined therein, as well as for the benefit of miners and other employees in and about the mines. It is thus apparent that the Legislature contemplated, what is well known, that mines are in many, if not most, cases operated by others than those owning the lands.

The obvious purpose of the statute was, first, to afford security to miners and laborers in and about the mines, by giving them a lien for their wages, and next, by a like lien, to secure the land-owner and others interested for their rent and royalty in case the mine was operated by a lessee. The lien of the one, in such a case, is as broad as that of the other, the difference being the miner's takes precedence. Both, however, have a lien upon the same property, that of the lessee. Where the relative rights of the two are concerned in a case in which the land-owner has done that which the statute contemplated would or might be done, viz., leased the mine, it is not to be supposed the Legislature intended that the claim of the miner was not only to have precedence over that of the land-owner, but that the former might in addition subject the mine and such of the fixtures, machinery, etc., connected therewith, as belonged to the land-owner, to pay the debt of the lessee for wages.

An evident distinction is to be observed between those cases in which the mine is operated by the owner of the soil, machinery, fixtures, etc., and those in which, for a certain rent or royalty paid to the owner, another controls the operations of the mine. The lien which the statute imposes in favor

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of those working in and about the mines, must be understood as applying to such interest or estate as the person operating the mine has therein. *Forbes v. Gracey*, 94 U. S. 762.

The power to create a lien or charge upon property implies that the person whose contract, or dealings in reference thereto, subject it to the lien, has some right in or authority, express or implied, over the property, which enables him to bind it to the extent of his own interest, or authorizes him to do such acts as will bring the interest of the owner under a lien which the law imposes.

Thus the lien of a sub-contractor or material-man is upheld, upon the theory of an implied authority from the owner to the original contractor, to employ men and purchase materials for the structure, which is adding to the value of the owner's property. The lien must be founded "on contract with the owner, either directly or indirectly; for it is only thus that one man can ever acquire a claim upon the property of another." Phillips *Mech. Liens*, sections 58-65; Overton *Liens*, sections 538-564; *Brown v. Morison*, 5 Ark. 217; *Belding v. Cushing*, 1 Gray, 576; *Jacobs v. Knapp*, 50 N. H. 71.

It is upon this theory that the case of *Colter v. Frese*, 45 Ind. 96, and the cases which support it, proceed. *Woodward v. McLaren*, 100 Ind. 586. No analogy can be maintained between the case of a contractor who is supposed to possess implied authority to bind the property of the owner, to the extent of subjecting it to a lien imposed by law in favor of sub-contractors, and material-men, and that of a tenant or lessee who has no such authority. In the one case the relation warrants the inference of authority. In the other no authority is implied. The extent of the power or authority of the lessee is to bind such interest, and such only, as he possesses in the property. Unless an actual agency is established, the interest of the lessee alone is chargeable. *Wilkerson v. Rust*, 57 Ind. 172, and cases cited; *McCarty v. Burnet*, 84

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Ind. 23; *Muldoon v. Pitt*, 54 N. Y. 269; Kneeland Mech. Liens, section 43.

The general principle is applicable here, that no one can confer a greater right to, or interest in, property than is possessed by himself, unless the principles of agency are involved, or unless the owner is in some way affected by the doctrine of estoppel. As we have seen, no agency is implied between lessor and lessee. No pretence is made that there was any concealment of the exact situation and ownership of the property, or that the appellees did not have full knowledge of the relation of their employer to the mine and other property upon which they are seeking to enforce a lien.

Meritorious as the law under consideration is, and liberal as its construction should be, it can not, within any recognized principles, receive such a construction as shall enable the employees of one who is known to have only a leasehold interest, to subject the lessor's property to sale for the debt of the lessee.

Such a construction would be alike disastrous to the interest of the land-owner upon whose land a mine is situate, and those interested in securing employment in mines. No prudent man would venture to lease a coal mine if it were understood that he thereby put his title to the mine, with whatever fixtures and machinery he may have equipped it with, in jeopardy for the wages of the employees who might engage to his lessee.

The security of miners and other workmen engaged in and about mines is confined to such interest as those in whose employ they are, or with whom they have some contract relation, direct or indirect, have in the mine, machinery, fixtures, and everything connected therewith, or which is used in and about the mine.

This requires that the miner have regard for the extent of the interest of the lessee, in whose employ he is, in the mine, fixtures, machinery, etc., seeing that the property of the lessor

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is not bound for the wages of those who are in contract relation with the lessee alone.

It was error to overrule the demurrer to the complaint. Judgment reversed, with costs.

Filed June 25, 1886.

 No. 12,614.

SIMONS v. SIMONS.

107	197
170	401

DIVORCE.—*Interrogatories to Party not Proper.*—*Case Followed.*—Interrogatories to the parties are not proper in an action for a divorce. *Barr v. Barr*, 31 Ind. 240, followed.

SAME.—*Alimony.*—*Discretion of Trial Court.*—It is only where there is an abuse of discretion that the Supreme Court will review the decision of the trial court as to the amount of alimony.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

ELLIOTT, J.—The appellant instituted this suit for the purpose of obtaining a divorce from the appellee. A decree granting him a divorce was rendered, but it was also decreed that he should pay the appellee as alimony the sum of six hundred dollars.

The trial court refused to require the appellee to answer interrogatories propounded to her by the appellant, and of this ruling complaint is made, but, as we think, unsuccessfully. It is true that our late decisions declare that suits for divorce are to be regarded to a very great extent as ordinary civil actions. *Evans v. Evans*, 105 Ind. 204. But it is also true that these decisions hold that where special provisions are contained in the statute regulating proceedings in divorce cases, they will govern, although different from the rules

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which obtain in ordinary civil actions. *Powell v. Powell*, 104 Ind. 18. Our judgment is that so far, at least, as concerns the method of procuring and presenting evidence, there are such provisions in the statute as make it improper to use interrogatories to the parties. It is our conclusion that the decision in *Barr v. Barr*, 31 Ind. 240, governs this case and forbids the employment of interrogatories.

The question as to the amount of alimony is one for the decision of the trial court, and it is only where there is an abuse of discretion that this court will revise that decision. We can not say that there was any abuse of discretion in this instance.

Judgment affirmed.

Filed June 25, 1886.

107	198
127	355
107	198
129	306
107	198
135	505
107	196
144	453
107	198
151	203
107	198
163	309
107	198
165	482

 No. 12,335.

LANGLEY v. MAYHEW ET AL.

WILL.—*Decedents' Estates.*—*Widow's Statutory Right to Five Hundred Dollars.*—*Relinquishment.*—*Election.*—*Cases Criticised.*—The claim of the widow of a decedent to the five hundred dollars for which provision is made by section 2269, R. S. 1881, may be released and relinquished by her election to take under an inconsistent testamentary provision. *Nelson v. Wilson*, 61 Ind. 255, and *Whiteman v. Swem*, 71 Ind. 530, criticised.

PRACTICE.—*Jurisdiction.*—*Docketing Probate Cause as Civil Action Not Available Error.*—The docketing and trial as an ordinary civil action of a matter which belongs to the probate jurisdiction of the circuit court, is merely an irregularity, and not an available error.

From the Allen Circuit Court.

R. S. Robertson and *J. B. Harper*, for appellant.

T. W. Wilson, for appellees.

NIBLACK, C. J.—Petition by Hannah Langley, widow of John Langley, deceased, against Sarah Mayhew, executrix

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of the last will and testament of the said John Langley, and the other devisees and legatees under the will, to have the final settlement of the estate set aside and reopened under the provisions of section 2403, R. S. 1881.

The petition charged that the petitioner was entitled to \$500 out of the estate of the decedent as his widow, in addition to certain bequests to her by the will, which fact the executrix had fraudulently concealed from her, and that the estate was finally settled without her knowledge, and without paying her said sum of \$500.

Issues were formed by general denials, and upon certain matters specially pleaded in defence.

At the request of the parties the circuit court made a special finding of the facts, which may be summarized as follows: That the decedent duly executed his last will on the 29th day of April, 1881, as charged in the petition, and thereafter, on the 19th day of July, 1881, died leaving said will, which was duly admitted to probate on the 21st day of the same month, in full force; that the first item of such will was in these words: "After the payment of all my just debts (of which I have very few), expenses of last sickness, and funeral expenses, out of my personal property, I will, bequeath and devise to my wife, Hannah Langley, the sum of fifteen hundred dollars, and if I shall not leave sufficient personal property to pay the same, it shall be a lien upon such real estate as is not specifically devised herein, and secondly, on such as is so devised: *Provided, however,* That whatever sum or amount shall be paid by me to the said Hannah during my lifetime shall be deducted from said sum of \$1,500, and the sum of \$487.61, notes of Robert Brooks, and secured by his mortgage, if accepted by her, is to be deducted therefrom. In addition to said sum of \$1,500, I will and bequeath to said Hannah Langley all my household furniture and the use for and during her natural life of the house situate on the rear part of lot numbered twenty-four (24), Chute & Prince's addition to the city of Fort Wayne,

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Allen county, Indiana, and sufficient ground to make good such use of said house. The above and foregoing being in lieu of any and all interest in my estate, both real and personal, which she might have as my widow." That devisees were made to Sarah Mayhew, the executrix, and the other children of the decedent by said will; that the petitioner and respondents are the legatees and devisees named in the testator's will; that the said Sarah Mayhew was, on the said 21st day of July, 1881, appointed executrix of the will, and entered upon the administration of the testator's estate; that said executrix, on the 12th day of April, 1883, returned an inventory of the testator's personal estate which was valued at and fairly worth the sum of \$1,762.46; that the real estate described in and disposed of by the will was all that the testator owned, or had any interest in, at the time of his death, and was of the aggregate value of \$5,500; that, on the said 21st day of July, 1881, the petitioner accepted from the executrix the Brooks notes named in the will and delivered to her the following receipt:

"\$487.61. Received of John Langley four hundred and eighty-seven $\frac{61}{100}$ dollars by notes of Robert Brooks, secured by mortgage, the same to apply upon and be credited and charged against a bequest of fifteen hundred dollars this day made to me by John Langley in his will, and which bequest I agree to accept in lieu of all rights in his estate as his widow. Fort Wayne, April 29th, 1881.

"HANNAH LANGLEY."

That, at the time of the execution of the will, the petitioner was present, and that it was arranged between her and the testator that she should execute the foregoing receipt and that the will and the receipt should be placed together in an envelope and left with the attorney, who drew them both, until after the testator's death; that, after the testator died, the executrix delivered the notes to the petitioner, and, with the latter's knowledge and consent, retained the receipt as a voucher to be used in the settlement of the estate; that, at

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the same time, the executrix paid to the petitioner the sum of \$512.38 in cash, to be applied upon the bequest to the latter by the will, and which was received and receipted for by the petitioner; that the petitioner was then in the possession of the household and kitchen furniture bequeathed to her, and so continued until the 21st day of April, 1883, when she executed a receipt therefor to the executrix as a legatee under the will; that in August and September, 1883, the executrix paid to the petitioner sums of money amounting in the aggregate to \$500 more, in response to which payments the latter receipted to the former in full of all bequests under the will; that, after the death of the testator, the petitioner took possession of the real estate devised to her and has ever since occupied the same under the will; that, on the 7th day of September, 1883, the executrix filed in the Allen Circuit Court her account for the final settlement of the estate upon which the clerk at the time indorsed, with his name attached, the words "Hearing set for October 6th, 1883;" that the executrix thereupon gave notice to all persons interested in the estate to appear in said circuit court on the last named day and to show cause why such account for final settlement should not be approved; also, requiring the heirs, legatees and devisees to appear in court on the same day and make proof of their respective claims to an interest in the estate; that such notice was duly published for two weeks successively before said 6th day of October, 1883, in the Fort Wayne Weekly Sentinel, a weekly newspaper of general circulation printed and published in the county of Allen, and posted up for a like length of time at the door of the court house in said county; that, on the 7th day of October, 1883, the court approved such account for final settlement, and the executrix was, by order of court, finally discharged; that the petitioner was not personally summoned to appear in court at said final settlement of the estate, nor was she present either in person or by attorney at such final settlement; that this proceeding was commenced

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on the 11th day of December, 1883, and was placed upon the common law docket of the court below, and all the entries and orders therein have been made upon the order-book containing the proceedings in ordinary civil actions; that the sum of \$500 herein demanded has never been paid to the petitioner.

Upon the facts as thus found, the circuit court arrived at the following conclusions of law:

First. That the petitioner was not entitled to recover from the decedent's estate the sum of \$500, or any other sum, in addition to what she had received under the will.

Second. That no cause had been shown for setting aside and re-opening the final settlement of the estate.

Exceptions were reserved to the conclusions of law at which the court thus arrived, and in support of the exceptions so reserved it is argued that the necessary inference from cases previously decided by this court is that a surviving wife can not be deprived of the \$500 out of her deceased husband's estate, to which she is entitled under section 2269, R. S. 1881, as additional to any provision which her husband may make for her by his will, and the cases of *Loring v. Craft*, 16 Ind. 110, *Dunham v. Tappan*, 31 Ind. 173, *Bratney v. Curry*, 33 Ind. 399, *Leib v. Wilson*, 51 Ind. 550, *Schneider v. Piessner*, 54 Ind. 524, *Nelson v. Wilson*, 61 Ind. 255, *Whiteman v. Swem*, 71 Ind. 530, and *Smith v. Smith*, 76 Ind. 236, are cited as justifying that inference.

Some of the cases cited, and possibly others, have gone to an extreme limit in holding that widows were respectively entitled to receive a specific sum of money, under the law, in addition to provisions made for them by their husbands in their wills, and, in consequence, we feel it incumbent upon this court hereafter to limit, rather than extend, the doctrine of those cases. It was held, in the well considered case of *Morrison v. Bowman*, 29 Cal. 337, that if, by the general scope of the will, it appeared that the husband intended to dispose of all the property under his control, half of which,

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under the law of that State, belonged to his wife, and that the assertion by her of her half-interest in the property must defeat the objects of the will, her acceptance of the provisions of the will was a relinquishment of all claim by her under the law. It is, too, an old rule in equitable jurisprudence, to which the administration of estates is closely allied, that a person shall not claim an interest under an instrument, whether it be a deed or a will, without giving full effect to such instrument as far as he can. This rule has been treated as one of universal application and without exception. It applies to the interests of married women; to interests immediate, remote or contingent; to interests of value or not of value. 2 Maddock Chancery, 47; 2 Story Equity Jurisprudence, section 1075; Pomeroy Equity Jurisprudence, sections 395, 461.

In the case of *Schneider v. Piessner*, *supra*, it was plainly intimated that a widow may release or relinquish her claim, under the law, to all interest in her husband's personal estate, and we know of no rule, whether of the statute or of the common law, which restrains her in the slightest degree from doing so. It is clearly inferable from sections 2491 and 2505, R. S. 1881, as well as from the text-writers, that the doctrine of election extends as much to an interest in the personal, as to an estate in the real, property of a decedent. 2 Redf. Wills, 369; 2 Jarman Wills, 1; Adams Equity, 92, *et seq.*; *Wright v. Jones*, 105 Ind. 17.

The claim of a widow to the statutory provision, made for her by section 2269 of the present code, may, therefore, be as readily relinquished by her election to take under an inconsistent provision of her late husband's will as any other right or interest in his estate.

As has been shown by the item of the will herein above set out, the provision made for the petitioner was declared to be in lieu of any and all other interests which she might have in the estate, whether real or personal, of the testator. This declaration became a condition in her acceptance of the pro-

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visions made for her by the will, and her election to take under the will was, in legal effect, an abandonment of all other claims against the property of her late husband. Besides, by her receipt executed at the time the will was made, the validity of which she impliedly recognized after her husband's death, the petitioner expressly agreed to accept under the will in lieu of all other claims against his estate. When, therefore, the estate was finally settled, she was under a two-fold restraint not to assert any further claim against the property disposed of by the will. Consequently, the facts of this case take it out of the rules of construction recognized by our former cases bearing on the same general subject.

The fact that this cause was entered upon the common law docket of the court below, and that all the entries and orders made concerning it were spread upon the common law order-book, is also urged as an objection to the proceedings below. It is true that the circuit courts of the State have a separate and distinct probate jurisdiction, and that this cause belonged to, and was within that jurisdiction. *Noble v. McGinnis*, 55 Ind. 528; *Douthitt v. Smith*, 69 Ind. 463. But its being docketed and otherwise treated as an ordinary civil action was an irregularity merely, and at most a harmless error.

Cross error is assigned upon the alleged insufficiency of the petition, considered as a complaint to set aside and reopen the final settlement. But the view we have taken of the case, in other respects, renders it unnecessary that we shall consider any question arising upon the pleadings.

The judgment is affirmed, with costs.

Filed April 14, 1886.

ON PETITION FOR A REHEARING.

NIBLACK, J.—Counsel for the appellant claim that we have, for reasons entirely unsatisfactory as well as wholly indefensible, declined to follow the conclusions logically resulting from our previous holdings, that widows are respectively entitled to an absolute sum out of the personal estate

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of their late husbands, in addition to any provision which their husbands may have made for them by will, and plainly intimate that good faith requires that we shall apply the doctrine of our cases, so in effect holding, and which were cited at the former hearing, to the case at bar as again presented. But we held before that the facts as found by the circuit court clearly established a release by the appellant of all claim against her husband's estate, independently and outside of the provision made for her by his will, and that the release, so established by the special finding of the facts, took this case out of the range of those cases. To that holding we still adhere, and confess ourselves at a loss to understand how any well instructed person could have come to any other conclusion. Besides, while the subject is again before us, it may not be amiss, not only to repeat, but to emphasize our former intimation, that some of the cases, cited as above at the former hearing, have gone to an extreme limit as to the rights of widows to an absolute sum out of their husbands' personal estates, notwithstanding inconsistent testamentary provisions. We are, in fact, now prepared to go further, and to say that this court as at present constituted would not follow some of those cases to the extent to which they would lead us, and notably so of the cases of *Nelson v. Wilson*, 61 Ind. 255, and *Whiteman v. Swem*, 71 Ind. 530, but would in a proper case be inclined to accept the testamentary rule of construction laid down by the California case of *Morrison v. Bowman*, also cited and referred to in the principal opinion. The case of *Wright v. Jones*, also alluded to in the same connection, leads us unmistakably in that direction.

Conceding, nevertheless, all that is asserted in behalf of the merits of the appellant's claim as an original demand against the estate, the facts, as found at the trial, disclosed no such illegality, fraud or mistake in the final settlement as was necessary to obtain a re-opening of such final settlement, and for that reason, if for no other, the appellant failed to

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show herself to be entitled to the relief demanded by her petition. R. S. 1881, section 2403.

The petition for a rehearing is overruled.

Filed June 26, 1886.

No. 11,609.

WASSON, TREASURER, v. THE FIRST NATIONAL BANK OF INDIANAPOLIS.

TAXES.—Deduction of Debts from Moneyed Capital.—National Bank Stock.—Discrimination.—Where the tax law of a State allows taxpayers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the State in the hands of its citizens, but denies to the owners of national bank stock the right to deduct their debts from the assessed value of such stock, it is such a discrimination, in view of the provisions of section 5219, R. S. United States, relating to national banks, as renders the State law to that extent inoperative.

SAME.—Tax Law of 1881.—Provision as to Deduction of Debts.—Material Discrimination.—Judicial Notice.—Under the tax law of 1881, a taxpayer may deduct his *bona fide* debts from all his moneyed capital and credits, except money on hand or on deposit, money loaned, bonds, and shares of stock in corporations, and the courts will take judicial notice of the fact that the moneyed capital from which the taxpayer may so deduct his debts is a material portion of the whole moneyed capital of the State.

SAME.—Debts May be Deducted from Assessed Value of National Bank Stock.—In the assessment and taxation of shares of national bank stock, the owners thereof, if they have no other moneyed capital or credits from which to deduct their *bona fide* debts, are entitled to deduct them from the assessed value of such shares of stock, notwithstanding the provisions of the tax law of 1881.

SAME.—“Money at Interest.”—“Money Loaned.”—The phrase “money at interest,” as used in the tax law of 1881, is the equivalent of “money loaned.”

SAME.—Schedule Controls in Case of Conflict.—The schedule provided by the tax law controls in case of conflict with any other portion of that law.

SUPREME COURT.—Rehearing.—Practice.—The Supreme Court will not grant a rehearing on questions not urged in argument before the decision in the cause, and, in this case, such questions will not be considered after a rehearing has been granted on other grounds.

From the Marion Superior Court.

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137 32
107 206
147 466
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150 233

107 206
184 458
6154 466

107 206
158 577

Wasson, Treasurer, v. The First National Bank of Indianapolis.

W. W. Woollen, S. Claypool, W. A. Ketcham and F. T. Hord, Attorney General, for appellant.

R. Hill, R. N. Lamb, A. L. Mason, R. B. Duncan, J. S. Duncan, C. W. Smith, J. R. Wilson and W. H. H. Miller, for appellee.

ZOLLARS, J.—It is well settled that this court will not grant a rehearing upon grounds not urged in argument preceding the decisions. *Board, etc., v. Center Tp.*, 105 Ind. 422, and cases there cited.

The main question presented by the record in this case is an important one. A rehearing was granted, and an oral argument solicited by the court upon that question.

It is now urged that the complaint is technically defective. These objections were not urged in argument prior to the former decision, and as a rehearing would not have been granted on account of them, we think that in this particular case, they should not enter into the decision. Without intending to commit the court in the way of a ruling, we may say in passing, that if we were to write upon those questions, as at present advised, we should feel constrained to hold that the objections are not well taken. If, however, appellant is correct in his contention, he may make available what he now urges by way of an answer below.

The one important question presented by the record is this: In the assessment and taxation of shares of national bank stock, are the owners thereof, having no other credits or moneyed capital from which to deduct their *bona fide* debts, entitled to deduct them from the assessed value of such shares of stock? The law of this State provides, that in the assessment and taxation of what in the statute is denominated credits, the individual taxpayer, as owner thereof, may deduct therefrom his *bona fide* debts, except debts of certain designated classes. R. S. 1881, sections 6332, 6333, 6336.

The first question for decision is: From what credits may

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such debts be deducted by the individual taxpayer, and what does the word "credit" include?

The statute further provides, that the assessor shall furnish to the taxpayer blanks upon which he shall furnish a list of his personal property of every description owned by him on the first day of April. Section 6330, R. S. 1881.

So far as material here, section 6332, is as follows: "In making out the statement, each person shall put down the credits due and owing from any person or corporation, whether in or out of the county, separately from the rest of his personal property; and every credit for a sum certain, payable either in money or labor, shall be valued at a fair cash value for the sum so payable; and if for any article of property, or for labor or for services of any kind, it shall be valued at the current price of such property, labor, or services. In making up the amount of credits which any person is required to list, for himself or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company, or corporation to any other person, company, or corporation, for a consideration received. * * Nothing in this section shall be so construed as to authorize any deductions allowed by this section to be made from the value of any other item of taxation than credits. In making out the statement, he shall also exhibit to the assessor, for the purposes of valuation, a list of all notes, drafts, mortgages, and judgments held or owned by him; and he shall, also, for the information of the assessor, furnish him with a list containing the number and amount of all United States and State bonds, and notes and other securities of the United States not taxable, held or owned by him on said first day of April."

The taxpayer is not allowed to temporarily convert his property and money into non-taxable securities for the purpose of escaping taxation.

The above provision of the section is, perhaps, to insure

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good faith in that regard, by furnishing the assessor some data from which to determine as to whether or not the taxpayer, by such conversion, has attempted to evade taxation. See, also, section 6335.

The list furnished to the taxpayer has two columns in which to set down the value of the articles of personal property or credits, etc. In one of these the taxpayer is required to set down the value, and the other is designed to be used by the assessor for a like purpose. If the value affixed by the taxpayer is satisfactory to the assessor, he may adopt it; if it is not, he may disregard it, and affix a valuation of his own.

It is required by the several sections of the statute, and especially by sections 6330 and 6336, that the taxpayer shall put down upon the list furnished to him all of his personal property, including credits due to him, of every description.

In putting down "the credits due and owing," the taxpayer is not required to itemize, but may put down the sum of them all, and his estimate of their value. In this he may be mistaken, or he may intentionally underestimate their value.

For the purpose of enabling the assessor to detect and correct the wrong, it is provided in the latter part of section 6332, *supra*, that the taxpayer shall exhibit to him a list of all notes, drafts, mortgages and judgments held or owned, etc. These are not to be furnished for the purpose of being listed by the assessor, but for the purpose of valuation. Of course, if the owner has neglected to list them, the assessor may do so, but the law contemplates a listing by the taxpayer. This all shows that notes, drafts, mortgages and judgments are all credits within the meaning of that section of the statute, and hence credits from which the designated *bona fide* debts may be deducted by the taxpayer. This, it seems to us, must be plain. The statute also provides the form of the schedule to be furnished by the assessor to the taxpayer. Section 6336. That schedule is full and specific, and was intended to, and does, provide in detail the place and manner of listing for

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taxation all articles and items of personal property, including moneyed capital and credits of every description. These are to be put down opposite to numbers. The first five numbers or items are as follows:

"1. Money on hand, or on deposit within or without this State, subject to my order, check or draft.

"2. All moneys loaned by me, either on time or on call.

"3. All bonds belonging to me or in which I have any interest, issued by bodies corporate, either within or without this State.

"4. All bonds belonging to me or in which I have any interest, issued by public corporations, including State, county, city, town, and all other bonds of this class.

"5. All shares of stock in any corporation formed outside of this State; and also all shares of stock in any corporation formed in this State, and conducting its business outside of this State."

From the above items the schedule makes no provision for deducting the designated *bona fide* debts of the taxpayers. It will be observed, also, that the above items do not include the "credits" mentioned in section 6332, *supra*; nor do they include "money at interest," except as that may be included in and as meaning the same as money loaned.

The only other number or item in the schedule material here is number or item 82, at the close of the schedule, which is as follows:

"82. CREDITS (by which is meant whatever
 is due to the party from any other
 person, company, or corporation, in
 the shape of labor, property, or
 money) amounting to \$
 Less my *bona fide* indebtedness
 (subtracted from the credits) . \$
 Leaving a residue of credits,
 amounting to \$"

This item in the schedule is in perfect harmony with our

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construction of section 6332, *supra*, and embraces the same kind of credits, and none other, from which the *bona fide* debts may be deducted. It does not include the first two items in the schedule, money on hand or on deposit, and money loaned on time or on call, nor does it include the items of bonds and stocks. It, therefore, includes notes, drafts, mortgages and judgments held or owned by taxpayers, except they are to secure money loaned; amounts due them for goods and various manufactured articles sold at wholesale or retail; for materials furnished; for work and labor; for professional services; amounts due upon public improvements; on account of lands sold, and all other credits of every description, due from any person, company or corporation, in the shape of labor, property or money, except amounts due on loans on time or on call. And this is so whether the notes, mortgages, judgments and the other items of indebtedness draw interest or not. Judgments draw interest under the provisions of our law. As a usual thing, notes and mortgages draw interest, and so, as a general thing, other accounts for goods, raw material and manufactured articles sold, draw interest after the expiration of stated periods of credit. The fact then that the credits may draw interest makes no difference under the schedule and section 6332, *supra*.

Section 6333, at first blush, seems to be in conflict with the above sections as we construe them. That section is by way of a limitation upon deductions to be made by the taxpayer. It provides that "No person, company, or corporation shall be entitled to any deduction from the amount of any bonds, stocks, money loaned, or money at interest," etc. If "money at interest," as used in the section, means anything different from "money loaned," if, in other words, it means that because accounts, notes, judgments, etc., may draw interest, they are "money at interest," then clearly the section, that far, is in conflict with the schedule and section 6332, *supra*.

It is a settled rule that in the construction of a statute, all

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of its various sections and provisions must be construed together, so as to ascertain the intention of the law-makers, and make the statute in all its parts consistent as a whole. Thus construing the statute, we have no doubt that "money at interest" was used as the equivalent of "money loaned." In ordinary parlance, "money at interest" has reference more to money loaned, than to interest bearing notes and accounts received for property sold.

Section 6273, in giving a definition of the terms "personal estate" and "personal property," as used in the act, provides that they shall include, amongst other things, all rights, credits, choses in action, all bonds and stocks, all money at interest, and all other credits and investments. Here, evidently, the term "money at interest" does not mean accounts and choses in action drawing interest, but money loaned. In section 6286, the term "money loaned" is used, and not the term "money at interest." Thus the terms "money loaned" and "money at interest" seem to be used in the act as convertible terms. If, however, there were an irreconcilable conflict between section 6332 and 6336, which provides the schedule, the latter must govern.

The schedule is the summing up and putting in shape for practical use what is provided in the preceding sections. The schedule has heretofore been regarded as controlling. It was so regarded under the tax law of 1852, as amended in 1869. *Clark v. Carter*, 40 Ind. 190. It was so under the tax law of 1872. *Matter v. Campbell*, 71 Ind. 512. It may be observed in passing that the act of 1872 is materially different from the act of 1881. And so the Supreme Court of the United States, in construing the tax law of 1872, placed its decision upon the schedule. *Evansville Bank v. Britton*, 105 U. S. 322.

Upon an examination of the whole statute, we are clearly of the opinion that the individual taxpayer may deduct his *bona fide* debts, of the class designated in the act, from all his moneyed capital and credits, except from the classes spec-

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ified in the first five items of the schedule as above set out, viz., money on hand or on deposit, money loaned, bonds, and shares of stock in corporations.

The National Bank Act provides that the shares of stock in national banks may be subjected to taxation under the laws of the State, with other personal property, "subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." Section 5219, United States Revised Statutes.

The limitations upon the taxation of shares of national bank stock imposed by the above section are imposed in almost the same language by our statute. R. S. 1881, sections 6306, 6307.

It has been many times held by the Supreme Court of the United States, that the authority of the States to tax the shares of national bank stock is derived wholly from the above act of Congress, and that without the consent of Congress these bank stock shares could not be taxed by State authorities at all. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Weston v. City Council of Charleston*, 2 Pet. 449; *People v. Weaver*, 100 U. S. 539.

The authority and privilege, of course, must be exercised under the limitations and restrictions imposed. The controlling questions then are, what are the limitations and restrictions imposed? What is the "moneyed capital," as used in the act?

Were we at liberty to place our own construction upon the act, we should be very strongly inclined to hold that "moneyed capital," as therein used, has reference to capital invested, as an investment for profit, whether in bonds, stocks, money loaned, or otherwise, and not to debts due to the taxpayer.

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growing out of the ordinary affairs of business life. Such, substantially, is the dissenting opinion of Chief Justice WART, concurred in by Justice GRAY, in the case of *Evansville Bank v. Britton*, *supra*. The court in that case, however, adopted a different construction, and it is the duty of this court, as it is the duty of all State courts, to follow the construction placed upon the act by that court.

The above case arose under our assessment law of 1872, and the questions were, what is meant by "moneyed capital," as used in the above act of Congress, and whether the owner of national bank stock having the designated *bona fide* debts; might deduct them from the assessed value of the shares of stock? It was held that he could, and that "moneyed capital" includes not only bonds, stocks, and money loaned, but all credits and demands of every character in favor of the taxpayer.

Mr. Justice MILLER, speaking for the court in stating and deciding the case, said:

"The objection made to the Indiana statute is the same as that made against the New York statute; namely, that it permits the taxpayer to deduct from the sum of his credits, money at interest, or other demands, the amount of his *bona fide* indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares.

"A distinction is attempted to be drawn between the Indiana statute and the New York statute, because the former permitted the deduction of the taxpayer's indebtedness to be made from the valuation of his personal property, while in Indiana he can only deduct it from his credits. And undoubtedly there is such a difference in the laws of the two States. But if one of them is more directly in conflict with the act of Congress than the other, it is the Indiana statute. In its schedule the subject of taxation from which the taxpayer may deduct his *bona fide* indebtedness is placed under two heads, as follows:

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“‘1. Credits or money at interest, either within or without the State, at par value.

“‘2. All other demands against persons or bodies corporate, either within or without this State.

“‘Total amount of all credits.’

“The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ.

“Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.

“It is unnecessary to repeat the argument in *People v. Weaver* (100 U. S. 539) on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholders to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.”

In the late case of *Boyer v. Boyer*, 113 U. S. 689 (20 C. L. J. 309), Mr. Justice HARLAN reviewed the cases, and from them deduced certain rules for the construction of the above section of the national bank act, the second of which is as follows:

“That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits, money at interest or other demands to the extent of

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his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."

There can be no doubt, that, under these decisions, all credits of whatever nature, which include the credits from which the taxpayer may deduct his *bona fide* debts, as here decided, whether interest bearing or not, are moneyed capital in the sense in which that term is used in the act. And under these decisions also, statutes which allow the taxpayer to deduct his debts from such moneyed capital, and deny this right to the holders of shares of national bank stock, must yield to the paramount act of Congress which inhibits such discrimination.

But what shall be said, when the taxpayer is allowed to deduct his debts from but a part of his moneyed capital, as here held, from his money capital, other than bonds, money loaned, and shares of stock? The act of Congress, as it has been held, does not require absolute equality, as that is difficult, if not impossible, of attainment. The cases hold, however, that the intention of Congress in the enactment of the statute was not to permit any substantial discrimination in favor of moneyed capital in the hands of the taxpayer, as against capital invested in shares of national bank stock. *Boyer v. Boyer, supra.*

In that case, at page 693, in speaking of the case of *Hepburn v. School Directors*, 23 Wall. 480, HARLAN, J., said: "That case is authority for the proposition that a *partial* exemption by a State, for local purposes, of moneyed capital in the hands of individual citizens does not, of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction. But it is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation where a very material part, relatively,

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of other moneyed capital in the hands of individual citizens, within the same jurisdiction or taxing district, is exempted from such taxation." Again, at page 695, in speaking of the cases generally, it was said: "These decisions show that, in whatever form the question has arisen, this court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital in the hands of individual citizens, as against capital invested in the shares of national banks." And still further, at page 701: "But as substantial equality is attainable, and is required by the supreme law of the land, in respect of State taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere."

In that case the State of Pennsylvania had exempted from local taxation, for county purposes, mortgages, judgments, etc., and imposed such local taxes upon the shares of national bank stock. It was held that the result was a material inequality, and that the bank stock could not be taxed for such local purposes. See, also, *First Nat'l Bank v. Treasurer of Lucas Co.*, 25 Fed. R. 749 (U. S. Cir. Ct. N. D. Ohio); *Ruggles v. City of Fond du Lac*, 53 Wis. 436.

The California statute, as in force in 1880, provided that "In assessing solvent debts not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to *bona fide* residents of the State," but did not allow a like reduction from the assessed value of national bank stock. It will be observed that the statute, like ours, does not allow such deduction from all moneyed capital.

In the case of *Miller v. Heilbron*, 58 Cal. 133, after quoting from the opinion in the case of *People v. Weaver*, 100 U. S. 543, which involved a statute of New York allowing a deduction of debts from the value of all personal property, except from shares of National or State banks, it was said: "So far as the immediate question is concerned, there is but one

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difference between the law of New York and the law of this State—a difference of degree.” It was held that so far as the State statute denied the deductions to the holders of national bank stock, it was in conflict with the act of Congress.

The holding of the above cases is, that the taxing laws of States can not be upheld, as against the act of Congress, so far as they may discriminate against national bank stock, by directly exempting a portion of other moneyed capital from taxation, or by doing the same thing in allowing a deduction of debts from the assessed value of a portion of other moneyed capital, and denies the same deduction to the holders of national bank stock, when such discrimination is so palpable as to show that it is material and serious, and that when such is the case, the holders of shares of national bank stock will be allowed to deduct their debts, the same as the owners of the other moneyed capital. Our statute makes no provision for deducting debts from the assessed value of shares of national bank stock, but, as we have seen, allows such deduction from a portion of other moneyed capital, and thus discriminates against national bank stock. Is that discrimination so material and serious that the owners of such shares of stock are entitled to deduct their debts, notwithstanding the statute? That depends upon the amount of the moneyed capital from which the debts of the taxpayer may be deducted, as compared with the whole of the moneyed capital of the State. This case comes here upon a demurrer to appellee’s complaint for an injunction. Unless the court may take judicial notice of the fact that the moneyed capital from which the taxpayer may deduct his debts as here decided, is a material portion of the whole moneyed capital of the State, the complaint is fatally defective, because it contains no averment as to that fact.

Our statute provides that matters of which judicial notice is taken need not be stated in a pleading. R. S. 1881, section 374. May the court take judicial notice of that fact?

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As we have seen, for the purposes of taxation in the hands of the taxpayers, the whole of the moneyed capital of the State, as specified in the schedule provided by the tax law, consists of money on hand or on deposit within or without the State, money loaned, bonds issued by bodies corporate, bonds issued by public corporations, and shares of stock in corporations, which includes shares of bank stock. For convenience, these several items may be regarded as constituting the first division of the moneyed capital of the State. From the assessed value of none of them can the debts of the taxpayer be deducted.

Another division includes all other moneyed capital of the State, the items of which consist, as we have also seen, of notes, mortgages and judgments, except for money loaned, amounts due for goods, wares and merchandise of all kinds, raw material, farming implements, machinery and manufactured articles of all kinds, sold at wholesale or retail, amounts due for labor and professional services, amounts due upon public improvements, on account of sales of real estate, live-stock, and farm products, and all other credits of every description due from any person, company or corporation, whether drawing interest or not, except as included in the first division above. These several items, from the assessed value of which debts may be deducted, may be regarded as constituting the second division of the moneyed capital of the State.

That the second division constitutes a very large and material part of the credits in the business of the State, and thus a very large and material part of the whole moneyed capital of the State, is a matter of such common knowledge as to be known to the courts. There are many things of which the courts must take judicial notice. For example, they take judicial notice of the seasons and the general course of agriculture. *Abel v. Alexander*, 45 Ind. 523 (15 Am. R. 270); *Tomlinson v. Greenfield*, 31 Ark. 557. That whiskey, beer and gin are intoxicating. *Myers v. State*, 93 Ind. 251;

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Eagan v. State, 53 Ind. 162. That ale is malt liquor. *Wiles v. State*, 33 Ind. 206. Of the time it takes to go from one city to another. *Fitzpatrick v. Papa*, 89 Ind. 17; see, also, *Pearce v. Langfit*, 101 Pa. St. 507 (47 Am. R. 737). Of the geography of the country, and that a point on a railroad, one mile from Rosedale, is in Park county. *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496. Of the population of towns and cities. *Kalbrier v. Leonard*, 34 Ind. 497. Of the meaning of C. O. D. *United States Ex. Co. v. Keefer*, 59 Ind. 263. Of the meaning of S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, sec. 18, T. 21 N., R. 7 E., 40 acres. *Jordan Ditching, etc., Ass'n v. Wagoner*, 33 Ind. 50. *Frazer v. State, etc.*, 106 Ind. 471. That the use of a farm in summer is worth more than in winter. *Ross v. Boswell*, 60 Ind. 235. Of the duties and powers of cashiers of banks. *Farmers, etc., Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332; *Sturges v. Bank of Circleville*, 11 Ohio St. 153. Of the facilities of travel between different points. *Hipes v. Cochran*, 13 Ind. 175; *Manning v. Gasharie*, 27 Ind. 399. Of the fact that there are classes of notes and bills, other than bank bills, in circulation in this State as money. *Hart v. State*, 55 Ind. 599. Of the general pecuniary condition of the country, as a part of the history of the times. *Ashley v. Martin*, 50 Ala. 537. Of the division of the Methodist Church into the Methodist Church North, and the Methodist Church South. *Humphrey v. Burnside*, 4 Bush (Ky.) 215 (225). That ice cream freezers had been in use before the invention for freezing dead bodies or fish. *Brown v. Piper*, 91 U. S. 37, 42. *Terhune v. Phillips*, 99 U. S. 592; *King v. Gallun*, 109 U. S. 99.

The courts of the State are bound to take notice, from its general history, that "during and since the war of the Rebellion, the adjutant general of this State has made records of the muster rolls of the different regiments of volunteers furnished by this State, in the military service of the United States." *Board, etc., v. May*, 67 Ind. 562. Upon the gen-

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eral subject of judicial knowledge, see *Buskirk Pr.*, p. 15, *et seq.*, and cases there cited.

Mr. Greenleaf says: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." 1 *Greenl. Ev.*, section 6, p. 12, 13; *Brown v. Piper*, *supra*.

In speaking of what courts will take judicial notice, it was said in the case of *Ho Ah Kow v. Nunan*, 5 Sawyer (U. S. Cir. Ct. Dis. Cal.), 552 (560): "Besides, we can not shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."

To hold in the case before us, that it was necessary to aver and prove that the above second division of the moneyed capital constitutes a large and material part of the whole moneyed capital of the State, would be to hold that the courts can not know judicially what must be known to the mass of the people, and what any intelligent person would be reluctant, if not ashamed, to confess he does not know.

To say that from this division of the moneyed capital, the taxpayer may deduct his debts, and that the holders of shares of national bank stock, having no other credits from which to deduct their debts, may not deduct them from the assessed value of such shares of stock, would be to establish such an inequality and discrimination against capital invested in such shares of stock, as the act of Congress, with the interpretations given it by the Supreme Court of the United States, will not tolerate.

The statutory privilege to taxpayers, of deducting their debts from the above second division of moneyed capital, is practically to relieve the most, if not the whole, of that capital from taxation, and leave the burdens to rest upon other property, including other moneyed capital. A taxpayer having that kind of moneyed capital may have a deduction of his debts from the assessed value thereof; while another, not

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having such capital, but having money on hand or on deposit, money loaned, and bonds and stocks (other than shares of national bank stock) may not have such a deduction. If there is any inequality or wrong in that, as between citizen taxpayers, it is a matter wholly for the Legislature.

The holders of shares of national bank stock are upon an equality with taxpayers having money capital of the second division above, and if, as between such holders and taxpayers owning moneyed capital of the first, and not of the second division above, there is an inequality, it is a matter for the Legislature and for Congress.

The Legislature may so shape the State laws as to result in this inequality. Against such legislation, there is no inhibition in the national bank act. Possibly, the Legislature might avoid this inequality, if it be such, by providing that taxpayers, not having shares of national bank stock, may deduct their debts from all or a certain proportion of their moneyed capital, and giving the same right to holders of shares of national bank stock to deduct their debts from a like proportion of their moneyed capital. Possibly, Congress might amend the national bank act to advantage. Doubtless, many holders of shares of national bank stock may have moneyed capital of the second division alone, and, if so, they may deduct their debts from its assessed value, and thus the privilege of deducting their debts from the shares of stock in such cases, can injure no one, as the debts can be deducted but once. That shares of national bank stock are taxed by State authority at all, is a matter of grace or license, and not of right. So the Supreme Court of the United States holds. The States, therefore, must tax shares of stock in accordance with that license.

After a thorough re-examination of the question involved, we are constrained to hold that under the averments of the complaint, the stockholders therein named are entitled to deduct their just debts from the assessed value of their shares of national bank stock.

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It has been suggested, in argument, that we ought, if possible, to rule otherwise, in order that the case might go upon appeal to the Supreme Court of the United States for a decision by that tribunal. We should be glad to have the case thus appealed, but we could not make a different ruling without disregarding our deliberate judgment, and placing this court, as we think, in an attitude of insubordination and hostility to the Supreme Court of the United States. It is the province of that court to interpret the acts of Congress, and the duty of the State courts to adopt and follow such interpretation.

The court below, at special term, sustained a demurrer to the complaint. That ruling was reversed at general term.

The judgment at general term is affirmed, at appellant's cost.

ELLIOTT, J., did not participate in the decision of this case.

Filed June 25, 1886.

 No. 12,522.

CHAPMAN v. MOORE.

107	228
144	433
107	223
165	89

PRACTICE.—*Objection to Evidence Must be Specific.*—*Supreme Court.*—A general objection that evidence is incompetent and immaterial, is not sufficient to present any question on appeal.

NEW TRIAL.—*Newly Discovered Evidence.*—*Lost Document.*—*Proof of Contents by Parol.*—A new trial will not be granted a party on the ground of newly discovered evidence, consisting of a lost document which he knew at the time of the trial to be in existence, and the contents of which, upon proof of loss, he could have proved by parol.

From the Kosciusko Circuit Court.

C. Clemans, for appellant.

ELLIOTT, J.—The appellant insists that the trial court erred in admitting evidence over his objections, but we think that the objections made to that court were not sufficiently

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specific. It is well settled that it is only such objections as are made in the trial court that can be successfully urged on appeal. *City of Delphi v. Lowery*, 74 Ind. 520. It is equally well settled that the general objection that evidence is incompetent and immaterial is insufficient to present any question on appeal. *Shafer v. Ferguson*, 103 Ind. 90, and cases cited; *Grubbs v. Morris*, 103 Ind. 166; *Stanley v. Sutherland*, 54 Ind. 339.

After the court had denied the appellant's motion for a new trial, a supplemental motion was filed by him, and this motion was also overruled. In this there was no error. The supplemental motion asks a new trial upon the ground of newly discovered evidence, and asserts that an order was given by the appellee to the appellant for four thousand feet of lumber, and that it was not found until after the trial. The affidavit, however, shows that the appellant knew of the existence of the order, and knew also of its loss prior to the trial, but made no effort to prove its contents by parol. We do not think a party has a right to thus remain silent until after the trial, and then for the first time ask the benefit of a document known to him to be in existence, and of the contents of which, upon proof of loss, he might have given parol evidence.

Judgment affirmed.

Filed June 26, 1886.

No. 12,197.

THE FIRST NATIONAL BANK OF INDIANAPOLIS v. ROOT
ET AL.

PLEADING.—*Construction of.*—A pleading must proceed upon some single, definite theory, which must be determined from the general scope and character of the pleading.

PLEDGE.—*Contract.*—*Collateral Security.*—*Withdrawal on Reduction of Debt.*—*Transfer of Collaterals.*—Where bonds and stocks are pledged as collateral

107	224
126	344
126	366
107	224
130	109
107	224
132	422
132	426
132	401
133	150
133	201
133	437
107	224
134	171
136	373
107	224
137	473
138	227
107	224
150	436

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security, under a contract stipulating that in the event of the reduction of the indebtedness, the pledgeor should be entitled to select and withdraw from the securities so pledged an amount equal to the reduction, one to whom the pledgeor has sold and transferred a part of such securities can maintain his right to them, as against the pledgee, where it is shown that prior to such transfer the pledgeor had paid, or caused to be paid, on such indebtedness, a sum in excess of the value of the securities so transferred.

SAME.—Consideration.—In such case, the pledgor can sell and transfer, either with or without consideration, the securities which he had the right under the contract to withdraw.

SAME.—What will Constitute Reductions of Indebtedness.—In such case, reductions of the indebtedness, effected in part by means of sales of property mortgaged to secure the indebtedness, rents of real estate the possession of which had been voluntarily delivered to the pledgee, sales of property on execution, etc., are reductions within the meaning of the contract.

From the Marion Superior Court.

S. Claypool, W. A. Ketcham and H. J. Milligan, for appellant.

F. Winter, for appellees.

MITCHELL, J.—The First National Bank of Indianapolis brought an action against Deloss and Jerome B. Root, composing the firm of D. Root & Co. From the averments in the complaint it appears that Deloss Root and D. Root & Co., being largely indebted to the bank, pledged, as collateral security, certain bonds and stocks, taking at the time as evidence of the terms upon which the pledge was made, a paper writing signed by the cashier of the bank, of the tenor following:

“Received of D. Root & Co. the following named stocks and bonds, which we are to hold as collateral security for any indebtedness which said D. Root & Co., or D. Root, may owe to the First National Bank. Should said D. Root, or D. Root & Co., reduce their indebtedness to said bank, they shall be entitled to select from the securities an amount equal to the reduction so made. The securities so left shall be

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strictly held as collateral, and shall in no case be sold until the real and personal property of said D. Root and D. Root & Co., shall have been exhausted."

Following the above is a schedule of the stocks and bonds, referred to in the writing, with a statement of their face value, aggregating \$82,000. Included in the schedule is the following item:

"Certificate No. 34, belonging to D. Root, 200 shares of the Franklin Fire Insurance Co., paid up in full, \$5,000."

All of the stocks and bonds, except the certificate above mentioned, had been withdrawn or sold, and the proceeds applied on the indebtedness to secure which it was pledged. There remained due of this debt to the bank \$25,736.60, which at the time the complaint was filed was in judgment. The complaint charged that the amount of property withdrawn exceeded the amount of reduction of the debt, and that the Roots, at the time the suit was commenced, were possessed of no real or personal property which was subject to execution. The relief prayed was, that the lien of the bank on the stock remaining in its possession might be foreclosed, that a sale might be ordered, and the proceeds applied on the judgment against Root & Co.

Kate H. Root filed an intervening petition, upon which she was admitted as a party defendant. By a cross complaint, in which the bank, Deloss and Jerome B. Root were named as defendants, she exhibited, in substance, the following facts: That the individual liability of Deloss Root to the bank grew out of the endorsement of a note by him for certain parties, and amounted at the time the pledge was made to \$7,000. It was averred that substantially all of the property which had been pledged was the individual property of Deloss Root, and that all the proceeds of that which had been sold or withdrawn had been applied exclusively in reduction of the debt of D. Root & Co. Deloss Root, since the pledging, had paid out of his individual funds and property, and had procured to be paid, on account, and in reduction of the

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indebtedness, the sum of \$7,500, that being more than the full amount of all his individual liability to the bank. The claim was, that he thereby became entitled to withdraw the stock of the Franklin Insurance Company theretofore pledged by him, and that after his right to withdraw had accrued, he sold, assigned and transferred the stock in question to the cross complainant, Kate H. Root. In her cross complaint she alleges a previous demand for the stock, and prays that it be adjudged her property, and that the bank may be required to transfer it, and account to her for the dividends received since demand made by her.

The joint answers of Deloss, Jerome B. and Kate H. Root, need not be noticed.

The second paragraph presented a state of facts not materially different from those contained in the cross complaint.

Separate demurrers were overruled to the special answer and to the cross complaint.

The plaintiff's special answer to the cross complaint was, in substance, that Kate H. was the wife of Deloss Root, and knew that the latter was indebted to the bank in the sum of \$30,000 at the time she received the pretended transfer of the stock from her husband; that the transfer was without consideration, and was made for the purpose of defrauding the creditors of Deloss Root.

A demurrer was sustained to this answer. The cause, having been put at issue, was tried by the court. A special finding of facts having been duly made, conclusions of law were stated thereon favorable to the cross complainant.

On behalf of the appellant, it is contended that the answer, in which Mrs. Root joined, as well as her cross complaint—in which substantially the same facts are alleged—were bad, and that in overruling demurrers to them, the court erred. The argument is, that the bank having recovered a judgment against D. Root & Co., which remained unsatisfied, it had the right, without regard to and independent of the contract under which the stock was delivered in pledge,

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to maintain a bill in equity for the purpose of subjecting it to sale. This position assumed, it is thence insisted that, because it does not appear that Mrs. Root paid a valuable consideration for the transfer of the stock in controversy, and because she did not, as it is argued, acquire an equity therein superior to that of the bank, her cross complaint failed to state facts which entitled her to any relief. It is contended further, that under the contract, set out in the complaint and referred to above, the plaintiff's right to the stock is complete, notwithstanding the facts averred in the cross complaint.

The general scope of the complaint plainly shows that the purpose of the proceeding was to enforce a lien created by the contract under which the stock was pledged. The frame of the complaint clearly indicates that it was not the intention to state a cause of action outside of the contract of pledging. All the pleadings and the issues in the case had reference to the rights of the parties as they might ultimately be determined under this contract. This court has often decided that every pleading must proceed upon some single, definite theory, which must be determined by its general scope and character. To this theory, so determined, the party must be held through all the stages of the case, and upon it he must stand or fall. The reasons for the rule have been so well stated that to repeat them would add nothing to its force. *Western Union Tel. Co. v. Reed*, 96 Ind. 195, and cases cited; *Mescall v. Tully*, 91 Ind. 96, and cases cited.

Moreover, if the purpose of the proceeding instituted by the bank was nothing more than to subject the stock in controversy to sale, so that the proceeds might be applied upon the judgment, without regard to the contract, resort to a court of equity was altogether unnecessary. If the proceeding was not to enforce the rights of the bank under the contract, then the complaint was bad, because the bank had an adequate remedy at law without invoking the aid of a court of equity. Having recovered a judgment against D. Root & Co., it was only necessary that an ordinary execution should

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have been sued out in order that stock belonging to Deloss Root, one of the firm, might have been subjected to sale.

The statute makes specific provision for the sale on execution of stock in an incorporated company. Section 723, R. S. 1881. Outside of the contract, which is set up in the bill, nothing appeared making a resort to a court of equity either proper or necessary. Nothing appeared in the record anywhere which adapts the case to a proceeding to set aside property fraudulently conveyed—if a proceeding of that character is applicable to sales of personal property—or to reach property by proceedings supplementary to execution. It nowhere appeared but that Deloss Root had, at the time of the sale and transfer of the stock to his wife, abundant other property subject to execution to satisfy the plaintiff's judgment, or that the plaintiff had any specific lien upon the stock other than that created by the contract set out. *Green v. Kimble*, 6 Blackf. 552; *Smith v. Railroad Co.*, 99 U. S. 398. The rights of the parties must, therefore, be determined upon the basis that the contract referred to defines the appellant's claim upon the stock, and that the right thus secured was the only subject of controversy.

The contract stipulated that in the event of a reduction by Deloss Root, or D. Root & Co., of their indebtedness, they should be entitled to select from the securities pledged an amount equal to the reduction. Both the answer and cross complaint averred that Deloss Root paid, or caused to be paid, in money and property, a sum in excess of the total amount of his indebtedness, and in excess of the value of the stock. This being admitted, he became entitled to withdraw such of the stock, equal in amount to the reduction effected, as he should select. Having acquired this right, it was his privilege, so far as any contractual obligation to the bank was concerned, to sell and transfer the stock which he had the right to withdraw, either with or without a valuable consideration. The conclusion follows, that the averment that after so reducing his indebtedness he sold and trans-

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ferred the stock in dispute to Kate H. Root, was sufficient to show her right to such stock without averring that the transfer was upon a valuable consideration. For the same reason, it follows that the plaintiff's answer to the cross complaint and the reply to the special answer, both of which set up affirmatively that the transfer to Kate H. Root was without consideration, were insufficient. There was no error in the rulings of the court in respect to the pleadings.

Upon the issues made the court found the facts specially, and stated its conclusions of law thereon. It was found that the stock in controversy was of the value of \$4,000, and that before the commencement of the suit it had been sold and assigned for a valuable consideration, by Deloss to Kate H. Root. It was also found that the debt, for which the stock had been pledged, had been reduced in a sum largely in excess of the value of the stock in controversy. Some of the reduction resulted from voluntary payments made by Deloss Root, some from rents of property, the possession of which had been delivered to the bank. Still other reductions of the debt were the result of sales of real estate, some of which had been voluntarily mortgaged by Deloss Root to secure the indebtedness for which the stock was pledged; while other parcels were sold on executions issued on a judgment which had been taken against Deloss Root, and which has since been satisfied.

It is claimed that the sums voluntarily paid are not equal in amount to the value of the stock, and that reductions of the debt effected by means of sales of property, rent of real estate, etc., are not such reductions as are contemplated by the contract.

The only condition to the right to withdraw securities, which the contract imposed, was, that the debt or debts for which they were held as collateral security should be reduced. That the reduction resulted from sales of property was as much a reduction within the terms of the contract as if it had been accomplished by voluntary payment. In proportion as

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the debt was reduced securities might be withdrawn. This was the contract. Some of the sales made were upon mortgages voluntarily given to secure the debts for which the stock was held in pledge.

The money arising from the sale of the mortgaged property, as well as that which was received on execution sales, and for rents of the mortgaged property, went in reduction of the debt.

This was as effectual to reduce the debt to the extent of the money received by the bank, as if Deloss Root had himself sold the property, or collected the rents and turned the money over to be applied on the debt.

We need not determine whether a debt may be paid by the creditor receiving property from the debtor. *Hart v. Crawford*, 41 Ind. 197. The bank did not receive property. What it received was money arising from the sale of its debtor's property. This was of course payment *pro tanto*.

The special findings, moreover, enumerate payments voluntarily made, in excess of \$4,000, the ascertained value of the stock in controversy. With this additional fact in view, the right of Deloss Root to withdraw the stock at the time of its transfer to Mrs. Root would seem, in any aspect of the case, to be beyond controversy.

There was no error.

The judgment is affirmed, with costs.

Filed June 26, 1886.

No. 12,071.

OVER v. THE CITY OF GREENFIELD.

MUNICIPAL CORPORATION.—City.—Parol Contract.—Statute of Frauds.—Purchase of Fire Engine.—A municipal corporation may be bound by a parol contract; but such a contract for the purchase of a fire engine for a sum greater than fifty dollars is within the statute of frauds (section

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4910, R. S. 1881) and invalid, unless it is brought within one of the exceptions to such section.

SAME.—Common Council.—Resolution.—Regularity of Proceedings.—Presumption.—Pleading.—Where the common council of a city, by resolution, accepts conditionally a proposition for the sale of a fire engine, the regularity of the proceedings by which such resolution was adopted will be presumed, and averments showing the particular manner of its adoption are unnecessary.

SAME.—Written Instrument.—Instruction.—Practice.—Such resolution is not a written instrument within the meaning of section 362, R. S. 1881, and does not become part of an answer to a complaint to recover for the engine by being filed with it, and where its adoption is not otherwise verified by the record, an instruction construing it will not be considered.

SAME.—Construction of Contract.—Practice.—Where the evidence is not in the record, and hence does not show what kind of a contract was proved to exist between the parties, an instruction construing the contract between them will not be considered.

SAME.—Sale.—Condition.—Fraud.—Pleading.—Surplusage.—Where an answer to a complaint to recover the price of a fire engine alleges that the sale was only a conditional one, and that the plaintiff did not comply with the conditions, by reason of which the sale was not consummated, other allegations of fraud and misrepresentation will be regarded as surplusage.

From the Hancock Circuit Court.

J. H. Mellett, E. Marsh and W. W. Cook, for appellant.

C. G. Offutt, R. A. Black and W. H. Martin, for appellee.

NIBLACK, C. J.—Complaint by Ewald Over against the city of Greenfield to recover the price of a Victor Hand Fire Engine, with the usual equipment, alleged to have been sold to such city as the successor of the town of Greenfield.

The complaint was in six paragraphs, to the second and third of which demurrers were sustained.

The first paragraph was for goods sold and delivered at the request of the defendant. The second was for the engine and equipment alleged to have been bargained and sold to the defendant at its like request.

The fourth paragraph averred that, on the 14th day of October, 1882, the plaintiff submitted to the town council of the town of Greenfield a proposition in writing as follows:

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"I propose to deliver on the cars here (at Indianapolis), one Victor Hand Fire Engine, one iron water tank on wheels holding four or five barrels of water, one hose reel, to hold five hundred feet of hose, five hundred feet $1\frac{1}{2}$ in. 4-ply hose, all necessary couplings for do., 25 feet suction hose, coupling and strainers for do., 4 hose wrenches, 2 nozzles with $\frac{1}{2}$ and $\frac{3}{8}$ tip all necessary, and will submit said engine to a test at my shop, and will warrant same with 12 men at brake to throw 40 feet through 250 feet of hose, or 50 feet through 200 feet of hose. Price \$700. Terms of sale cash. I will further warrant the same for one year, with fair usage, against all defects by reason of bad material and workmanship;" that said town council, after considering said proposition, suggested an amendment in writing in these words: "Provided he" (Ewald Over) "will subject the engine to a test of 250 feet of hose and throw 45 feet from the nozzle, and the engine and hose bearing the pressure of the required force," which amendment was accepted by the plaintiff, and the proposition, as thus amended, was submitted to the common council of the city of Greenfield, as the successor of the town council of the town of Greenfield; that said proposition was accepted by said common council; that thereupon the mayor of said city of Greenfield addressed the following letter to the plaintiff:

"GREENFIELD, IND., Oct. 14th, 1882.

"EWALD OVER, ESQ.—*Dear Sir*—The council accepted your proposition as amended while here. You will, therefore, proceed to build the engine as stipulated, and when you are ready for the test, which has been decided to take place here only before a committee, please notify one day before so that I may make necessary ar. See Webster * * .

"WM. J. SPARKS, Mayor."

That the plaintiff made and delivered to the defendant a Victor Hand Fire Engine, with all the appliances proposed to be furnished with it by him, and in these, as in all other respects, fully complied with the contract herein above set

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out, on his part; that the defendant accepted and received said engine and appliances, and still retains them in its possession, but has failed and refused to pay for the same.

The fifth and sixth paragraphs of the complaint averred, only in different forms, and respectively relied upon substantially the same facts as above set forth in the fourth paragraph.

The defendant answered in three paragraphs:

First. In general denial.

Second. Admitting the submission of the amended proposition in writing by the plaintiff to the defendant, as stated in the fourth, fifth and sixth paragraphs of the complaint, but averring that upon the receipt of such proposition the common council of the city by a resolution, a copy of which was exhibited, agreed to accept the same upon the condition that said engine should comply with all the stipulations contained in said proposition, and would throw a stream of water forty feet from the nozzle through two hundred and fifty feet of hose, or ninety feet through one hundred feet of hose, and on the further condition that the plaintiff would submit said engine to a test in the city of Greenfield before a committee to be appointed by the common council of that city, and that said committee should report to said council that said engine had complied with all the conditions of such test; that said common council thereupon appointed a committee to witness such test and to make a report thereon; that the plaintiff shipped said engine and hose and other appliances to the city of Greenfield, and submitted the same to a test before a committee appointed as above stated, he being personally present at the time; that after the completion of said test, the committee reported in writing to the common council of the defendant that said engine, through a hundred feet hose with a half inch tip, threw water only fifty-four feet from the nozzle, and that at no time while the test was being applied did the plaintiff use, or furnish to be used, a five-eighth inch hose tip with which to test the power of said engine to throw water; that thereupon said common

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council by a resolution, a copy of which was also exhibited, rejected the plaintiff's proposition to sell said engine, hose and other appliances, and refused to purchase or receive the same, notice of all which was communicated to the plaintiff.

Third. Also, admitting the submission of the plaintiff's amended proposition to sell to the defendant an engine, water-tank and other appliances as stated in the fourth, fifth and sixth paragraphs of the complaint, but averring that said proposition was accepted by a resolution of the common council upon the condition stated in the second paragraph of answer; also, averring that the plaintiff's representations, concerning the construction, capacity and performances of said engine, were false and fraudulent, enumerating the particular respects in which such engine was defective and inferior, and in which it had failed to perform on a trial test as the plaintiff had represented it would do when its capacity should be tested as agreed by the parties; that as soon as the defendant ascertained the defective and inferior quality of such engine, and its inability to stand the test which had been applied to its capacity to throw water, it tendered said engine, water-tank and other appliances back to the plaintiff, and notified him that it would not pay for the same, and that ever since said engine, water-tank and other appliances had remained in the city of Greenfield, subject to plaintiff's order for removal or otherwise.

Demurrers were overruled to both the second and third paragraphs of the answer, after which issues were formed, followed by a verdict and judgment for the defendant.

It is conceded in argument that the second paragraph of complaint counted upon a parol contract for the purchase of the engine and accompanying articles of property, and, as an objection to the sufficiency of that paragraph, it is urged that a municipal corporation is not bound by a parol executory contract.

The ancient methods by which only a municipal corporation could be bound by contract have been very much re-

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laxed by the modern authorities. Such a corporation may now, through its authorized officers or agents, be bound by parol, provided the contract be not one which the law requires to be in writing. Dillon Munic. Corp., sections 192, 450. But the contract price relied upon in the paragraph in question was for a sum greater than fifty dollars, and under section 4910, R. S. 1881, a contract of sale for a price greater than that sum must, except in certain exceptional cases, be in writing. As there was no averment bringing the parol contract counted upon within any of those exceptional cases, the contract was presumably an invalid one. *Harper v. Miller*, 27 Ind. 277; *Krohn v. Bantz*, 68 Ind. 277; *Carpenter v. Galloway*, 73 Ind. 418. No argument is submitted in support of the third paragraph of the complaint, and hence no question is presented upon that paragraph which we are required to decide.

Error is assigned upon the overruling of the demurrer to the second paragraph of the answer, and that assignment of error is based upon the claim that the paragraph was bad for failing to aver that the resolution of the common council of the city of Greenfield, expressing its conditional acceptance of the plaintiff's proposition to furnish for the use of the city the engine and accompanying appliances, was adopted by a vote taken upon the yeas and nays as provided by section 3099, R. S. 1881. But we can not agree that the paragraph was bad for the reason stated. All the presumptions ought to be indulged in favor of the regularity of the proceedings by which the resolution referred to was adopted, and hence no affirmative averment as to the particular manner of its adoption was necessary, conceding that a yea and nay vote is required upon the passage of such a resolution, a question we have not considered, and concerning which nothing is now decided.

Error is also assigned upon the overruling of the demurrer to the third paragraph of answer, and that claim of error is grounded upon the assumption that the paragraph was noth-

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ing more than an attempted defence of fraud and misrepresentation by which the defendant was wrongfully induced to purchase the engine and accompanying appliances, and that as a defence of fraud and misrepresentation, the paragraph was defective in several essential particulars. We do not, however, place the construction contended for upon the paragraph. We construe it as having stated facts amounting to an allegation that the sale charged in the several paragraphs of the complaint, was only a conditional sale, and that the plaintiff had failed to comply with the conditions which he had agreed to perform, by reason of which the sale was never consummated. All the allegations of fraud and misrepresentation we regard as having been mere surplusage and as having added nothing either to the force or effect of the paragraph. The essential facts set up by the paragraph were, in some respects, neither clearly nor compactly stated, but as we construe them, they constituted a substantially good defence to the complaint.

Questions were reserved upon certain instructions given by the court upon its own motion, and upon other instructions asked by the plaintiff and refused by the court.

The first instruction given by the court told the jury that the amended proposition of the plaintiff, submitted to the common council of the city of Greenfield, and the resolution of that body conditionally accepting such amended proposition, constituted the contract between the parties, and then proceeded to give a construction to the contract into which the parties had thus entered. The correctness of this instruction is challenged. The objection made to the instruction is that it gave an erroneous construction to what is assumed to be the contract between the parties. But the evidence is not in the record, and hence there is nothing before us to show what the real contract was proven to be at the trial, or to indicate what construction ought to be given to any supposed agreement between the parties. We are, for this reason, unable to pronounce any judgment upon the cor-

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rectness of the instruction in question as applicable to the evidence, or any part of it, which may have gone to the jury.

The second instruction assumed to give a construction to the resolution of conditional acceptance claimed to have been adopted by the common council. But that resolution is not before us in any authentic form. It was not a written instrument within the meaning of section 362, R. S. 1881. Hence the filing of a copy of it with the second paragraph of the answer did not make it a part of that paragraph. *Parsons v. Milford*, 67 Ind. 489; *Matheney v. Earl*, 75 Ind. 531; *Sedgwick v. Tucker*, 90 Ind. 271; *Campbell v. Hunt*, 104 Ind. 210.

There is nothing in the record to indicate that it was read in evidence at the trial. Consequently, the fact that such a resolution was ever adopted by the common council is in no manner verified by the record. For these reasons, this second instruction, given by the court, raises no question which we are required to decide, or which we would be justified in deciding at the present hearing.

In the absence of the evidence, no available question is presented upon any of the remaining instructions, whether given or refused by the court.

The judgment is affirmed, with costs.

Filed March 30, 1886; petition for a rehearing overruled June 26, 1886.

 No. 12,452.

BLOUNT v. RICK.

SET-OFF.—*Action on Promissory Note.*—*Reply of Account as Set-Off to Set-Off Pleaded by Defendant.*—One who has a note and an account against another, may sue upon the note, and reply the account as a set-off against an equal amount pleaded as a set-off by the defendant.

SAME.—*Replied Set-Off Need not be Held when Action Commenced.*—Where a

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set-off has been pleaded by the defendant, the plaintiff may reply, by way of set-off to the defendant's plea, any claim held by him at the time such plea was filed. It is not necessary that the claim replied should be held by the plaintiff at the time his action was commenced.

PLEADING.—Construction.—Written Instruments.—Accounts.—Exhibits.—Uncertain Averments.—In construing pleadings, written instruments and accounts filed therewith as required by section 362, R. S. 1881, may be looked to in aid of uncertain averments, and in many instances they are controlling.

INSTRUCTIONS TO JURY.—Making Part of Record Without Bill of Exceptions.—Practice.—In order that instructions may be a part of the record without a bill of exceptions, they must be filed as required by section 533, R. S. 1881, and the record must affirmatively show that they were so filed.

From the Delaware Circuit Court.

G. H. Koons, for appellant.

ZOLLARS, J.—Appellee sued appellant upon a promissory note. Appellant pleaded a set-off. To this plea appellee replied a set-off.

Appellant's demurrer to this reply was overruled. Upon the verdict of the jury judgment was rendered against appellant for the amount of the note. The evidence not being in the record, we can not tell whether the amount of appellee's set-off equalled that of appellant, or whether the jury found each to be groundless. Appellant seeks to make the question here, that a claim acquired by the plaintiff after the commencement of his action, but before the plea of set-off is filed by the defendant, can not be replied as a set-off to a set-off. The record does not present that question for decision. It is averred in the reply that when the plea of set-off was filed by appellant, he was, and still is, indebted to the appellee, over and above the note in suit, \$82 upon a book account for professional services rendered and medicines furnished, etc. A bill of particulars was filed with and as a part of the reply. This bill of particulars shows that the services were rendered and the medicines furnished by appellee in 1881. It is said in argument that this account was assigned to appellee by her husband after this suit was commenced. There is

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nothing in the pleadings, nor in the record, to show that fact, if it is a fact. The reply shows that the services were rendered and the medicines furnished by appellee. The averments do not preclude the idea that appellant was indebted to appellee upon the account when this action was commenced. The bill of particulars, which is a part of the reply, shows that he was so indebted at that time, and for a long time prior thereto. In construing pleadings, written instruments and accounts filed therewith, in obedience to the requirements of the statute, R. S. 1881, section 362, must be looked to, and in many instances they are controlling. *Carper v. Gaar*, *Scott & Co.*, 70 Ind. 212; *Hurlburt v. State, ex rel.*, 71 Ind. 154; *Bayless v. Glenn*, 72 Ind. 5; *Crandall v. First Nat'l Bank of Auburn*, 61 Ind. 349; *Mercer v. Hebert*, 41 Ind. 459.

The record presents this question, and this question only: May a person, having a note and an account against another, sue upon the note, and reply the account as a set-off against an equal amount pleaded as a set-off by the defendant? That question is answered in the affirmative by the cases of *House v. McKinney*, 54 Ind. 240; *Turner v. Simpson*, 12 Ind. 413; *Reilly v. Rucker*, 16 Ind. 303; *Curran v. Curran*, 40 Ind. 473; R. S. 1881, section 367. The demurrer to the reply was properly overruled.

Appellant's learned counsel contend that the court below erred in its instructions to the jury, and in refusing those asked by him in behalf of appellant. He, however, really concedes that neither the instructions given, nor those refused, are properly in the record. The clerk below copied into the transcript what purport to be instructions given and refused, but there is nothing to show that they were filed, as required by section 533, R. S. 1881. In order that instructions may be a part of the record without a bill of exceptions, they must be thus filed, and the record must affirmatively show that they were so filed. That is not shown by

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the record before us, neither were the instructions brought into the record by a bill of exceptions. *O'Donald v. Constant*, 82 Ind. 212; *Elliott v. Russell*, 92 Ind. 526; *Olds v. Deckman*, 98 Ind. 162; *Landwerlen v. Wheeler*, 106 Ind. 523.

It results from the foregoing that the judgment must be affirmed, at appellant's costs. It is so ordered.

Filed March 31, 1886.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—As stated in the principal opinion, appellee replied a set-off to appellant's answer of set-off. Appellant contended, and still earnestly contends, that the reply is bad, because it replies a set-off acquired after the suit was commenced, and that this fact is shown by the reply. The reply is as follows: "And for reply to said second paragraph of said defendant's said answer, and by way of set-off, she says that when said second paragraph of said answer was filed in this suit, the said defendant was, and still is, justly indebted to her, over and above the note sued on in this cause, in the sum of eighty-two dollars and twenty-five cents, upon a book account, for professional services rendered and medicines supplied to the defendant and certain members of his, the defendant's family, at the special instance and request of the defendant, at sundry and divers times, in the year A. D. 1881, and since, up to this time, a bill of the particulars whereof is herewith filed, made a part of this paragraph of reply, and marked exhibit 'A'. And she says said sum of eighty-two dollars and twenty-five cents remains unpaid and due. She therefore offers to set off her said account of eighty-two dollars and twenty-five cents against the defendant's account set up in said second paragraph of answer, and she demands judgment as in her complaint herein she has demanded judgment."

The bill of particulars filed with the reply is headed as follows:

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"1881. JARET L. BLOUNT to MARY C. RICK. Dr.
"June 21st, to visit and medicine for Ross . . . \$3.00"

Following this item are a number of like items for visits and medicines for different members of appellant's family during the months of June, July, August, September and November, 1881, and one item of \$1 in January, 1882, aggregating eighty-two dollars and twenty-five cents.

It is contended that the case was disposed of below, upon the theory that the professional services were rendered and the medicines furnished by appellant's husband, and that he assigned the account to her subsequent to the commencement of the action, and about the time the answer was filed, and that such is the fact. This may all be so, and we assume that as a matter of fact it is so, because counsel so declare. This court, however, sits for the correction of errors, and, as has often been declared, will not overthrow judgments of the trial courts unless errors appear by the record.

Appellee may have a husband, but the record does not show it. The husband may have rendered the professional services and furnished the medicines, but that is not shown by the record. It is alleged in the reply that appellant was indebted to appellee "upon an account for professional services rendered and medicines supplied to the defendant," etc., at the special request of appellant.

When we turn to the bill of particulars we find the charge and statement that appellant is debtor to Mary E. Rick, appellee, "1881, June 21st, to visit and medicines," etc. The only reasonable interpretation of the above language of the reply, and of the account, is that appellee rendered the professional services and supplied the medicines. It may be that appellee is not a physician, but it would not be a very startling fact if she were. At least there is nothing to indicate in any way that the services were rendered and the medicines supplied by another, and the account assigned to her. If the pleadings do not state the facts as they really are, the error should have been in some way corrected or avoided below.

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This court must deal with the case as presented by the record. As we have seen, it is alleged in the reply that when the second paragraph of answer was filed by appellant, he was indebted to appellee upon a book account. This is not the same as an absolute averment that appellant became indebted upon the account at that particular time, and was not so indebted prior thereto, or prior to the commencement of the action. It does not follow from the averment that he may not have been so indebted prior to the commencement of the action.

If, however, it were material that the indebtedness should have existed prior to the commencement of the action, the above averment would not be a sufficient averment of that fact, because averments of facts must be positive and certain. But, as we have seen, a bill of particulars was filed with and as a part of the reply. When we turn to that, we find that the services were rendered and the medicines furnished in 1881 and 1882, more than two years before this action was commenced.

The statute requires that when a pleading is founded on a written instrument, or on account, the original or a copy thereof must be filed with the pleading. R. S. 1881, section 362. It is just as necessary to file the account or a copy of it, where the pleading is founded thereon, as it is to file the original or a copy of a purely written instrument where the pleading is founded on such. And when either is filed with a pleading, it becomes a part thereof just as much as if copied at length therein. To say the least, and as much as need be said here, such exhibits will assist and cure uncertainties in the pleading. See cases cited in principal opinion; see, also, *Mercer v. Hebert*, 41 Ind. 459.

In the case of *Booker v. Ray*, 17 Ind. 522, it was held that averments of a pleading may be made certain by reference to diagrams forming a part of a contract, and filed with the pleading.

In the case of the *Second Nat'l Bank, etc.*, v. *Hutton*, 81

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Ind. 101, an account was filed with the pleading as an exhibit. It was said: "The office of a bill of particulars, in such a case as this, is to make the plaintiff's precise cause of action more certain, definite and specific, than the same has been stated in the common counts. In such a case, without regard to what may have been stated in general terms in the complaint, the plaintiff's evidence and right of recovery are limited, under the law, strictly and precisely, to the exact claim or cause of action shown or set forth in the bill of particulars."

We reaffirm, as we held in the principal opinion, that the bill of particulars filed with the reply became a part of it, and aided the uncertain averment therein as to when appellant became indebted to appellee; and that, taking the averment and the bill of particulars together, it sufficiently appears that appellant was indebted to appellee upon the account before the action was commenced, and that hence the question which appellant seeks to make upon the right of appellee to reply the account as a set-off, is not presented by the record. But, accepting counsel's statement, that that was the real question discussed and decided below, we decide it here.

Assuming then that appellee did not hold the account at the time the original action was commenced, but held and owned it at the time appellant filed his plea of set-off, had she the right to reply the account as a set-off to appellant's set-off?

The statute provides that the defendant may answer any new matter constituting a defence, counter-claim or set-off. R. S. 1881, section 347. It further provides that "A set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." Section 348.

It is clear that when the defendant answers a set-off, he must bring his case within the statute by making it appear from the averments in his answer, that the debt, etc., pro-

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posed to be set off was held by him at the time the suit was commenced. *Gregory v. Gregory*, 89 Ind. 345.

The above statute and decision, of course, have reference to cases where the set-off is brought forward by the defendant to the action.

The only statute we have upon the question of replying a set-off, is the following: "A party to any action may plead or reply a set-off or payment to the amount of any cause of action or defence, notwithstanding such set-off or payment is barred by the statute." Section 367.

This statute in no way requires that the set-off replied shall have been held by the plaintiff at the time he commenced his action. There is no such requirement by any statute, unless it must be inferred from the statutory requirement in relation to a set-off pleaded by the defendant.

Thus far, we have spoken of set-off, as pleaded by way of answer and reply, because of the terms used in the statutes, but, in fact, a plea of set-off is a cross action more than an answer. In the case of *Kennedy v. Richardson*, 70 Ind. 524 (530), it was said: "A set-off, strictly speaking, is not a defence to the action in which it may be filed. It is simply a cross action; and as such it must state facts sufficient to constitute, not a defence to the action in which it may be filed, but a cause of action against the opposite party." See, also, *Boil v. Simms*, 60 Ind. 162; *Mullendore v. Scott*, 45 Ind. 113. A plea of set-off must be substantially the same as a complaint, and is to be tested by the same rules and methods. *Ewing v. Patterson*, 35 Ind. 326; *Shoemaker v. Smith*, 74 Ind. 71.

The demand to be set off constitutes an independent cause of action, and may be brought forward in the action commenced by the plaintiff, or the defendant may institute an independent action thereon against the plaintiff. See *Davidson v. Remington*, 12 How. Pr. R. 310.

A plea of set-off being in the nature of a cross action by way of cross complaint, the filing of appellant's plea of set-

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off was, for all practical purposes, the commencement of a cross action against appellee. That cross action appellee had a right to meet with a plea of set-off, and if she held a set-off against appellant at the time that cross action was commenced, she had a right to plead it, and make it available by proof.

If, instead of pleading his set-off, appellant had commenced an independent action against appellee, her right to plead and make available the set-off would have been beyond question. No sufficient reason has been advanced, and we know of none, why she had not the same right to plead it and make it available as against the cross action by appellant.

Petition for a rehearing overruled.

Filed June 26, 1886.

No. 12,434.

BUSCHER v. SCULLY.

PRACTICE.—*Exclusion of Evidence.*—*Misconduct of Counsel in Argument.*—*Affidavit.*—*Bill of Exceptions.*—Rulings of the trial court in excluding evidence, or in refusing to check the misconduct of counsel in argument, can not be brought into the record by affidavit. The proper mode is by a bill of exceptions.

ARGUMENT OF COUNSEL.—*Misconduct.*—*When Available for Reversal of Judgment.*—It is only where the improper statements of counsel in argument are of such a material character as to probably influence the jury in returning a wrong verdict that they are available for the reversal of the judgment.

SLANDER.—*Charge of Fornication or Adultery.*—It is slander to falsely charge a woman with fornication or adultery, whether in direct terms or by the use of words which impute the offence and are so understood by the hearers.

SAME.—*Variance.*—A variance in the tense of the libellous words as charged in the complaint, and as shown by the evidence, will not preclude a recovery.

From the Hamilton Circuit Court.

W. Neal and J. F. Neal, for appellant.

D. Moss and R. R. Stephenson, for appellee.

107	246
145	166
107	246
1167	373

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ELLIOTT, J.—The appellee's complaint contains two sets of slanderous words, and is unquestionably sufficient to repel the demurrer addressed to the entire pleading, even though it should be conceded that one set was not actionable.

Rulings of the trial court in excluding evidence or in refusing to check the misconduct of counsel in argument can not be brought into the record by the affidavit of one of the parties. The proper mode of getting such rulings into the record is by setting them forth in the bill of exceptions as the action of the court. *Indianapolis, etc., G. R. Co. v. Christian*, 93 Ind. 360.

Our statute makes it slander to falsely charge a woman with fornication or adultery, and this is but a declaration of the American common law. Odgers Libel and Slander, 84, American editor's note. It is not essential that the charge should be made in direct terms; it is sufficient if the words used are such as impute to her fornication or adultery, and were so understood by those who heard them. *Proctor v. Owens*, 18 Ind. 21; *Wilson v. Barnett*, 45 Ind. 163; *Waugh v. Waugh*, 47 Ind. 580; *Branstetter v. Dorrough*, 81 Ind. 527, and authorities cited; *Seller v. Jenkins*, 97 Ind. 430.

The complaint charges that the words imputing a want of chastity were used in the past tense; while the evidence shows that they were spoken of a matter in the present tense. This is not such a variance as precludes a recovery. Townshend Slander and Libel (3d ed.), section 367.

Judgment affirmed.

Filed March 24, 1886.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The appellant contends in his petition for a rehearing that the record presents the question of the misconduct of counsel in argument in two ways, upon affidavit and by recitals in the bill of exceptions, and that we were in error in holding that it was sought to be presented only on affidavit. It certainly was attempted to be presented by af-

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fidavit, and it is doubtful whether all that is recited in the record does not refer to the statements of the affiants; but, however this may be, the statements of counsel in argument, even if improper, were not of such a material character as to warrant a reversal. It is only where the improper statements of counsel are of such a material character as that it appears probable that they were instrumental in obtaining a wrong verdict, that a reversal will be adjudged. *Boyle v. State*, 105 Ind. 469; *Shular v. State*, 105 Ind. 289, and authorities cited.

Petition overruled.

Filed June 26, 1886.

107 248
188 479

No. 12,176.

McCORMICK v. HARTLEY ET AL.

CHATTEL MORTGAGE.—*Recording.*—*Seniority.*—*Fraud.*—Where a chattel mortgage is not recorded within ten days, as required by statute, but a new mortgage, duly recorded, is given in renewal, the latter will be senior to an intervening recorded mortgage, executed by the mortgagor upon the same property for the purpose of defrauding the first mortgagee.

SAME.—*Foreclosure of Fraudulent Mortgage.*—*Injunction.*—A mortgagee of personal property, notwithstanding the mortgage debt is not due, and without regard to the solvency or insolvency of the mortgagor, may maintain a suit to enjoin the enforcement of a judgment of foreclosure rendered upon a mortgage executed to defraud him.

From the Benton Circuit Court.

D. E. Straight, U. Z. Wiley, S. F. Carter and J. V. Hadley,
for appellant.

S. M. Shepard and C. Martindale, for appellees.

NIBLACK, C. J.—Complaint by Joseph H. Hartley, John Ross and John W. Switzer, charging that prior to the 1st day of November, 1882, Thomas F. Redmond was indebted to

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them in the sum of \$1,000, such indebtedness being evidenced by a promissory note payable on that day; that said Redmond, after giving such note, had executed to the plaintiffs a chattel mortgage to secure the payment of the same upon one Washington hand-press, one Nonpareil jobber, and all the fixtures and type belonging to the Benton Review, but that said mortgage, by reason of neglect, was not recorded in the proper recorder's office within ten days after the same was executed; that, on the 5th day of January, 1883, the said Redmond, fraudulently and corruptly combining and confederating with Albert G. McCormick, his father-in-law, and without any consideration, executed to the latter a chattel mortgage on the same property, which was duly recorded in the proper recorder's office within ten days after its execution; that, on the 6th day of January, 1883, the said Redmond renewed the note held against him as above stated by the plaintiffs, and made the renewal note payable on the 1st day of November, 1883, and also executed a chattel mortgage to the plaintiffs upon the same property contained in his first mortgage to them, and described in his mortgage to McCormick, to secure the payment of such renewed note; that this last named mortgage was properly recorded in the recorder's office of the county in which said Redmond resided, within ten days after the same was executed; that at the time Redmond executed to McCormick a chattel mortgage as herein above set forth, he had not sufficient property to pay all his debts, but was in fact hopelessly and notoriously insolvent, which fact the said McCormick then well knew; that Redmond executed the McCormick mortgage, and caused it to be recorded, without the knowledge or consent of McCormick, and that said mortgage was not in fact delivered to McCormick until long after it was so recorded; that said mortgage was executed for the purpose of hindering, delaying and defrauding the said Redmond's creditors; that afterwards McCormick commenced a suit in the Benton Circuit Court against Redmond to foreclose his said pretended

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mortgage, but without making the plaintiffs herein parties to said suit; that, on the 20th day of February, 1883, McCormick recovered a judgment in such suit against Redmond for the sum of \$620.68, and a foreclosure of such pretended mortgage; that the said Redmond was not indebted to the said McCormick in any sum whatever, either at the time said suit was commenced, or when such judgment was rendered, and that such suit was prosecuted for the purpose of cheating and defrauding the plaintiffs and of depriving them of the benefit of their lien upon the mortgaged property; that the said McCormick was then threatening to have an order of sale issued upon his said judgment of foreclosure against the said Redmond, and to sell the property therein described, and would do so if not enjoined and inhibited by competent authority; to the great and irreparable injury of the plaintiffs. Wherefore the plaintiffs demanded that a temporary restraining order might be issued against McCormick, and that, upon a final hearing, the judgment of foreclosure rendered as above in his favor might be annulled and set aside, and that he, the said McCormick, should be perpetually enjoined and inhibited from enforcing or attempting to enforce such judgment.

A temporary restraining order was issued as demanded, and, upon their appearance to the action, McCormick and Redmond jointly demurred to the complaint, but their demurrer being overruled, Redmond demurred separately and his demurrer was sustained.

At the final hearing between the plaintiffs and McCormick, the circuit court made a finding in favor of the plaintiffs, and entered an order annulling and setting aside the judgment of foreclosure obtained by McCormick against Redmond, and perpetually enjoining and inhibiting McCormick from enforcing or attempting to enforce such judgment.

McCormick assigns error upon the overruling of the demurrer filed by him and Redmond jointly, upon the alleged ground that the complaint was insufficient as against him as well as Redmond.

It is sought to be maintained in argument that the complaint was fatally defective: *First*. Because of the neglect of the plaintiffs to have their first chattel mortgage recorded within ten days after its execution, the diligent and not the negligent being entitled to equitable relief. *Secondly*. Because it was shown that the mortgage debt of the plaintiffs was not due when the action was commenced. *Thirdly*. Because it was not averred that Redmond had no other property at the time of the commencement of this suit to which the plaintiffs might resort for the collection of their debt. *Fourthly*. Because the manner in which the plaintiffs would have been injured by a sale of the mortgaged property on the McCormick judgment was not stated. *Fifthly*. Because it was not made sufficiently apparent that the appellants had no other adequate remedy.

In the first place, all other things being equal, equity favors the more diligent. Where one, by his negligence, permits another to obtain a business advantage over him, his negligence will be taken into account against him upon an application for equitable relief against the advantage which has thus been obtained over him. This is too elementary to require the citation of authorities. No such a question of negligence is, however, presented in this case. The complaint charged that Redmond owed the plaintiffs a pre-existing debt, and that his mortgage to McCormick was to hinder, delay and defraud the plaintiffs in the collection of their debt. This the demurrer admitted, and, the facts being admitted, the McCormick mortgage, however valid as between the parties, became junior and subordinate to the mortgage of the plaintiffs.

In the next place, it is true, as contended, that until a creditor acquires a lien upon the property of the debtor, the latter has full dominion over his property, and may convert one species of it into another species, and may alienate to a purchaser. It is also true, that without such a lien a creditor can not have an injunction to prevent the

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debtor from disposing of his property, or permitting others to do so, although he may have reason to apprehend that the contemplated disposition will be fraudulent as against creditors, but a different rule prevails where a creditor has acquired a lien upon his debtor's property, and especially a specific lien, as by the execution of a mortgage. *Bump Fraud. Con.* 527. A mortgagee of personal property acquires an interest in the property mortgaged, for the protection of which he may appeal to the courts without waiting till the mortgage debt becomes due. *Boone Mort.*, sections 257, 258, 285; *Woodruff v. Halsey*, 8 Pick. 333; *Welch v. Whittemore*, 25 Maine, 86; *Jones Mort.*, section 684; *Walker v. Radford*, 67 Ala. 446.

This was not a suit to foreclose the plaintiffs' mortgage. Nor was it an action to recover a judgment for the mortgage debt. It was simply and only an appeal to the equity jurisdiction of the circuit court for the protection and preservation of the mortgaged property as a security for the payment of the debt when it should become due. For the purposes of this suit, therefore, it was quite immaterial whether the mortgage debt was or was not due.

In the third place, the plaintiffs, having obtained a mortgage to secure the payment of their debt, had the right to resort primarily to the mortgaged property for its payment, and to take such measures as were necessary for its protection and preservation without reference to whether Redmond might be solvent or insolvent when their debt should become due.

In the fourth place, the allegations that the mortgaged property was liable, and was about to be sold on a judgment of foreclosure obtained for the purpose of hindering, delaying and defrauding the plaintiffs, and under circumstances which might and probably would result in an ultimate loss to them of all their interest in the property, were allegations of facts from which a material and probably irreparable injury to the plaintiffs might be inferred.

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In the fifth place, all matters pertaining to the foreclosure of a mortgage are inherently of equitable jurisdiction. Jones Mort., section 1443.

The protection and preservation of mortgaged property, as a security for the payment of the mortgaged debt, also pertain to the same jurisdiction. Herman Chat. Mort. 485, and authorities cited. So, also, do proceedings instituted, as in this case, for relief against fraud. Pomeroy Eq. Juris., sections 119, 164, 1230, 1345; Bump Fraudulent Conveyances, 530.

The judgment is affirmed, with costs.

Filed April 20, 1886; petition for a rehearing overruled June 26, 1886.

No. 13,131.

HACKNEY v. WELSH.

EXTRADITION.—*Surrender of One Brought by Requisition from Another State.*—

Escape.—Where one commits a felony in Michigan, and voluntarily comes into this State and is arrested for a felony committed here, and while in custody a warrant for his arrest, issued on a requisition from Michigan, is received by the officer detaining him, but the accused, escaping from custody, flees to Ohio, from which State he is returned to Indiana upon requisition, he may, upon the failure of the prosecution against him in this State, be surrendered to the authorities of Michigan on the requisition from that State.

SAME.—*Good Faith of Public Officers.*—*Presumption.*—The presumption is that public officers discharge their duties in good faith, and the mere fact that the accused was kept in custody for more than a year, when a *nolle prosequi* was entered to the charge preferred against him in this State, does not show bad faith.

SAME.—*Good Faith not Affected by Knowledge or Expectation of Sheriff.*—*Prosecuting Attorney.*—The good faith of extradition proceedings is not affected by the knowledge or expectation of reward of the sheriff, as the State is not represented by that officer but by the prosecuting attorney.

SAME.—*Authentication.*—*Governor's Certificate.*—The Governor is not required to certify that an information and other papers accompanying a requi-

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sition are genuine; it is sufficient if he certifies that they are duly authenticated.

SAME.—*Affidavit.*—*Signature of Prosecuting Attorney.*—An authentication by affidavit and by the signature of the prosecuting attorney is sufficient.

From the Decatur Circuit Court.

J. D. Miller and *F. E. Gavin*, for appellant.

J. K. Ewing, *C. Ewing*, *W. A. Moore* and *J. O. Marshall*, for appellee.

ELLIOTT, J.—The appellant petitioned for a writ of *habeas corpus*, alleging, in his petition, that he was unlawfully restrained of his liberty by the appellee; that the cause of his restraint was an arrest under a warrant issued by the Governor of Indiana upon a requisition from the Governor of Michigan; that the restraint is illegal in this, that he is a resident of the State of Ohio, and in September, 1885, was arrested by authority of a warrant issued by the Governor of that State upon a requisition from the Governor of Indiana; that this requisition was issued upon an indictment returned by the grand jury of Decatur county, in this State, charging him with a felony; that he was surrendered to the agent of this State to be tried on that indictment, and that he has been continuously in the jail of Decatur county on that charge from the time the indictment was returned until April, 1886, when a *nolle prosequi* was entered.

The return of the appellee alleges that the petitioner is held in custody under a warrant issued by the Governor of Indiana upon a requisition from the Governor of Michigan; that the petitioner committed the crime of larceny in the State of Michigan, and, fleeing from justice in that State, voluntarily came into Indiana; that, by virtue of the indictment returned against him by the grand jury of Decatur county, he was confined in the jail of that county on the 12th day of December, 1884, and there remained until the 12th day of September, 1885, when he escaped and fled to the State of Ohio; that, upon a warrant issued by the Governor

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of that State pursuant to a requisition of the Governor of Indiana, he was arrested and brought back to the jail of Decatur county from which he had escaped ; that the warrant issued on the requisition of the Governor of Michigan came to the hands of the appellee on the 29th day of December, 1884 ; that the petitioner is not a resident of Ohio, but is a travelling pickpocket, and that neither the State of Michigan nor its agents had any connection with the petitioner's arrest in Ohio.

There is some conflict in the authorities as to whether a person who is brought from one State to another to answer a particular charge can be tried on any other charge than that upon which he was extradited. *State v. Stewart*, 60 Wis. 587 (50 Am. R. 388) ; *Adriance v. Lagrave*, 59 N. Y. 110 (17 Am. R. 317) ; *In re Noyes*, 17 Albany L. J. 407 ; *U. S. v. Caldwell*, 8 Blatchf. 131 ; *U. S. v. Lawrence*, 13 Blatchf. 295 ; *Williams v. Bacon*, 10 Wend. 636 ; *Browning v. Abrams*, 51 How. Pr. 172 ; *Com. v. Hawes*, 13 Bush, 697 (26 Am. R. 242) ; *State v. Vanderpool*, 39 Ohio St. 273 (48 Am. R. 431) ; *Compton v. Wilder*, 40 O. S. 130 ; *In re Cannon*, 47 Mich. 481. Instructive and interesting discussions of this subject will be found in 14 Albany L. J. 96 ; Princeton Review, January, 1879 ; North American Review, May, 1883 ; 20 Albany L. J. 425 ; Spear Extradition, 558 ; Church on Habeas Corpus, section 462.

We can not accept as authority the cases in which treaty stipulations exerted a controlling influence, for here there are no such stipulations, and in our opinion there is an essential difference between the two classes of cases. The case before us is entirely unaffected by treaty stipulations and is a purely inter-state one. There is a class of cases, we may remark in passing, which strongly support the doctrine of the cases which hold that a person brought into a State to answer a particular charge may be tried upon another. We refer to those cases which hold that no matter how the criminal comes within the jurisdiction of the State he may be tried.

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State v. Wenzel, 77 Ind. 428 ; *Ex Parte Krans*, 1 B. & C. 258 ; *Ex Parte Scott*, 9 B. & C. 446 ; *Ker v. People*, 110 Ill. 627 (51 Am. R. 706) ; *Ham v. State*, 4 Texas App. 645 ; *Dows' Case*, 18 Pa. St. 37. But we are not required to enter this field of controversy, for we regard the case before us as essentially different from those to which we have referred.

The difference between this case and the cases lying in the field of controversy is this: Here the State, upon whose request the accused was extradited, is not seeking to try him for any offence, nor to subject him to its jurisdiction. The authorities of Indiana are not seeking to do more than to allow the requisition from the State of Michigan to operate upon a fugitive from justice who had voluntarily come within our territory. They do not seek to try him for any offence under our laws, but all they are seeking to do is to give effect to the demand of a sister State. It is really Michigan and not Indiana that detains the petitioner. Indiana, therefore, is not guilty of any bad faith, nor of any breach of comity.

There is still another important difference between this case and those referred to, for here the fugitive was voluntarily in Indiana before December 29th, 1884, when the warrant on the requisition from Michigan was received by the appellee as sheriff of Decatur county, and he was, therefore, subject to arrest on that warrant before he escaped from jail and fled to Ohio. Prior to his imprisonment he was voluntarily in Indiana, and it was by his escape from the jail of Decatur county that he succeeded in leaving our territorial limits. If he had not escaped, it is quite clear that he could have been rightfully surrendered under the warrant issued by the Governor of this State. When that warrant came to the hands of the appellee, the appellant was in this State, and might, we repeat, have been held under it, so that, when he was brought back to Indiana after his escape from jail, he was in no worse plight than when he fled. It was

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the fault of our officers, if fault there was, not of those of Michigan, that he did escape, and they are not answerable for his absence from Indiana. It would be an unsubstantial refinement to hold that the escape from jail and flight to Ohio deprived the Governor's warrant of force and required our officers to permit the appellant to again flee to that or some other State. We are not dealing with a case in which Indiana seeks to try a man for a violation of an Indiana law, nor are we dealing with a case where the officers of the State have brought a man within our territory for the purpose of subjecting him to the demand of another State. On the contrary, we have before us a case where the accused had voluntarily come into our State, was arrested for a violation of our laws, was imprisoned in one of the jails of the State when the demand reached our officers, and had succeeded in getting out of our territory by his escape from jail and flight to another jurisdiction. The fugitive was voluntarily in Indiana when our Governor issued the warrant; he was not brought here to make that warrant operative, for he had come here by his own voluntary act. The Michigan authorities now demand him, and all that Indiana does in surrendering him is to yield to the demand of a sister State a fugitive who was voluntarily in our State before that demand reached its officers.

A case is referred to by Mr. Spear as reported in Binn's Justice, where it was held, "where a defendant is brought into a State as a fugitive from justice, after acquittal, or conviction and pardon, he can not be surrendered to the authorities of another State as a fugitive, but must be allowed an opportunity to return to the State in which he is domiciled." Spear's Law of Extradition (2d ed.) 558. We can not ascertain the facts of that case, but we know that it was the decision of the court of Quarter Sessions, and therefore of but little value as an authority. So far as we can judge of the case it is different from the present, as it does not there ap-

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pear that when the demand from the sister State reached the State to which it was addressed, the accused was confined in jail for an offence committed after he had voluntarily come into the State. This we regard as an essential fact, exerting an important influence in the case. But, conceding that the case is directly opposed to our views, it is difficult, if not impossible, to reconcile it with the decision in *Dows' Case*, *supra*, where it was said, by the court, speaking through one of the ablest judges that ever occupied its bench, GIBSON, C. J., that "A judge at the place of arrest, could not be bound to discharge a prisoner proved to have fled from a well-founded accusation of murder." The decision in *People v. Sennott*, 20 Albany L. J. 230, is here strongly in point in support of our conclusion, although the case before us is a stronger one against the accused person than was that, for there the accused was not in the State of Illinois by his voluntary act when the warrant upon the requisition reached the hands of the sheriff; while here the fact is that at the time the Governor of Indiana issued his warrant the appellant was in this State, not brought here upon compulsory process, but here by his own act. The fact just mentioned exerts an important influence upon this case, and had it existed in the Illinois case would have disarmed Mr. Spear's criticism of much of its force. The same case came before Judge Drummond of the United States Circuit Court, and he decided it as the State court had done. 12 Chicago Legal News, 115.

We have no doubt that the authority of these decisions, waiving all other considerations except the rank and the standing of the courts, is much weightier than that of the court of Quarter Sessions of Philadelphia.

Our conclusion is further supported by the decision of the Court of Appeals of New York in *Adriance v. Lagrave*, *supra*, where this statement of the law was approved: "We admit in this country that, if a man is *bona fide* tried for the offence for which he was given up, there is nothing to pre-

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vent his being subsequently tried for another offence, either antecedently committed or not. * * Clarke Ex. 90."

In this instance the agents of the State of Michigan were not guilty of any wrong, for they are simply attempting to enforce a warrant issued by the Governor of Indiana at a time when the fugitive from Michigan was in Indiana, by his own act, and Indiana is not acting in bad faith, for there is no effort to try the petitioner for a crime different from that upon which he was extradited.

It is contended in the able brief of appellant's counsel that the fact that their client was kept in jail from September, 1884, until April, 1886, when a *nolle prosequi* was entered, shows bad faith. This contention can not prevail. The presumption is in favor of good faith, and the mere fact that the appellant was kept in custody does not show fraud. *Louisville, etc., R. W. Co. v. Thompson, post*, p. 442. So, too, the presumption is that public officers have faithfully discharged their duties, and the facts pleaded do not rebut either of these presumptions.

It is also asserted that "the information and other papers accompanying the requisition are not authenticated." In support of this position counsel say: "The Governor does not certify that they are genuine, but he says that they are duly authenticated." We do not understand that the law requires the Governor to certify that the papers are genuine; it is sufficient if he certifies that they are duly authenticated. *Ex Parte Reggel*, 114 U. S. 642.

We think counsel are in error in assuming that the papers are not authenticated, for we find that they are authenticated by affidavit and by the signature of the prosecuting attorney. *Ex Parte Reggel, supra*; *Tullis v. Fleming*, 69 Ind. 15; *Robinson v. Flanders*, 29 Ind. 10; *Nichols v. Cornelius*, 7 Ind. 611.

The reply to the return alleges that the sheriff knew that the appellant was not to be tried on the charge preferred against him by the grand jury of Decatur county, and that

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he brought him back to that county from Ohio for the purpose of returning him to Michigan and receiving a reward. We incline to the opinion that this reply is bad as a departure from the petition, but, aside from this consideration, we deem it bad. The prosecuting attorney of the judicial circuit, and not the sheriff, represented the State, and the knowledge of the sheriff could not affect that officer. The warrant and requisition were, we must presume, procured in good faith, and there is nothing alleged which overthrows this presumption.

The knowledge or expectation of the sheriff could not affect the State, nor any of its other officers; but, even if it could, certainly the State of Michigan would not be affected, and it is really that State, and not Indiana, that detains the appellant.

Judgment affirmed.

Filed June 26, 1886.

No. 12,513.

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THE WEED SEWING MACHINE COMPANY v. WINCHEL
ET AL.

GUARANTY.—Bond.—Contract.—A bond stipulating that the principal shall perform certain specified things, and that it shall be a continuing guaranty until after notice, is a contract of guaranty.

SAME.—Contract of Agency.—Bond for Performance.—Construction.—Where a contract of agency and a bond given by the agent to secure its performance are executed concurrently, they must be construed together.

SAME.—Liability of Sureties.—The sureties in the bond are not liable for transactions of the agent beyond the scope of his contract, or for failures which do not relate to some duty imposed thereby.

SAME.—Principal and Agent.—Where the contract is that the principal shall consign to the agent machines to be sold or leased by him, as the former's property, the sureties in the bond are not liable for sales made to the agent.

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SAME.—*New Contract with Agent.—Merger.—Release of Guarantors.*—Where, after breach of a contract, the performance of which is guaranteed, the creditor and debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and on terms different from those imposed by the original agreement, the old contract is presumptively merged, and the guarantors discharged from liability.

From the Grant Circuit Court.

W. W. Woollen and J. F. McDowell, for appellant.

A. Steele and R. T. St. John, for appellees.

MITCHELL, J.—This suit was brought by the Weed Sewing Machine Company against Winchel and Murphy, to recover on a bond executed by them with and as the sureties of one Sale. The plaintiff sought to recover the amount of a judgment it had previously recovered against Sale, and also the amount of three promissory notes executed by him payable to the sewing machine company, all of which, with interest, it was averred remained due and unpaid. Sale was alleged to be insolvent.

The case having been put at issue, a jury was required to return the facts to the court in the form of a special verdict.

The merits of the controversy may be fully determined by a consideration of the facts thus returned, without regard to some questions which have been discussed relating to the pleadings. Shortly stated, the facts found within the issues are as follows: On the 22d day of November, 1872, the Weed Sewing Machine Company appointed one Dennis S. Sale, of Marion, Indiana, its local agent. The appointment was by a writing which embraces minute and detailed stipulations covering the terms of the agency. The company agreed to consign sewing machines to Sale. These were to be sold or leased by him, as its property, on certain prescribed terms. Sales or leases were to be made for cash, or to responsible parties, whose notes were to be taken payable to the company and endorsed by the agent. An account of all sales and leases, together with all cash and notes received, was to be forwarded weekly, the agent having the right to

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retain either in cash or notes a stipulated commission on all sales or leases.

Concurrently with the contract of agency, the bond sued on was executed. It was in the penal sum of \$3,000, and recited that it was executed by Sale as principal and Winchel and Murphy as sureties. The condition of the bond was, that Sale would well and truly pay "every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred, on the part of said Dennis S. Sale to the said Weed Sewing Machine Company, whether such indebtedness shall exist in the form of book accounts, notes, renewals, or extensions of notes or accounts, acceptances, endorsements or otherwise, hereby waiving presentment for payment, notice of non-payment, protest, and notice of protest, and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed or assigned by the said Dennis S. Sale to the Weed Sewing Machine Company." It was also stipulated in the bond that it was to "remain in full force and effect, and a *continuing guaranty* until after notice in writing shall have been given and received by said Weed Sewing Machine Company."

On the 15th day of November, 1875, Sale, having ceased to transact business for the company as agent, purchased two machines of it and gave his note for \$80. After paying \$40 on the note so given, a judgment was recovered against him by the company for the unpaid balance and interest. In April, 1876, the agency having terminated in September, 1874, upon an accounting and compromise of the matters involved in the business, \$600 was agreed to be due from Sale to the company. This indebtedness grew out of the failure of Sale to pay over money which had been received by him from time to time, and which belonged to the company, as appeared by his reports made from week to week, as his contract required. These defalcations, beginning about thirty days after the agency commenced, and increasing gradually until the agency terminated, were exhibited on the weekly

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reports. They were known to the company and unknown to the bondsmen. When the accounting and compromise were had, Sale was solvent, and the company took his three notes due in twelve, twenty-four and thirty months for \$200 each, with eight per cent. interest, and ten per cent. attorney's fees. This settlement did not include the note for the machines sold to him in 1875.

The jury returned, that Sale executed the notes in settlement of his account with the company. The notes were payable at a bank in this State. The sureties had no knowledge of the indebtedness, and gave no consent to the settlement. If they had known of the indebtedness—Sale being then solvent—they could have secured themselves. Before they were informed of their liability, Sale went into bankruptcy, and was, at the time of the trial, a non-resident of the State. The sureties had given no notice of a desire to be released from the bond.

Reckoning the judgment and notes, the principal, interest and attorney's fees amount to about \$1,300. Upon the facts returned, a judgment for the defendants was entered. To reverse the judgment, this appeal is prosecuted.

The question is suggested incidentally whether the obligation of the bondsmen is that of guarantors or of sureties. The bond is essentially a collateral engagement, into which the sureties have entered with their principal, the performance of whose original contract is thereby guaranteed. It stipulates on its face that the principal shall "well and truly" perform certain enumerated things, and that the bond shall be a "*continuing guaranty*" until after notice. In its nature, and by the very terms of the writing, this was a contract of guaranty. *La Rose v. Logansport Nat'l Bank*, 102 Ind. 332; *Singer M'fg Co. v. Littler*, 56 Iowa, 601.

Whether their obligation was strictly that of guarantors or sureties, is, however, in this case of secondary importance, as in either event the conclusion upon the facts returned must have been the same.

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The bond and the contract of agency, having been executed concurrently, must be construed together. It can not be assumed that the bond was intended as a security for the payment of debts which were not contemplated in the contract of agency, or a guaranty for the performance of obligations wholly outside of the contract with which it was executed. Its scope must, therefore, be restrained to the terms of the contract between the sewing machine company and Sale. *Burns v. Singer Manufacturing Co.*, 87 Ind. 541; *Irwin v. Kilburn*, 104 Ind. 113; *City of Lafayette v. James*, 92 Ind. 240 (47 Am. R. 140).

The bond having been executed presumptively with reference to, and to secure the performance of, the contract of agency, the liability of the sureties can not be extended so as to embrace transactions beyond the scope of the contract with which it was executed, nor can they be held to answer for the failure of the agent, except such failure relates to some duty imposed by the contract creating the relation of principal and agent.

This leads to a consideration of the terms of this contract. It nowhere contemplates that the agent shall become the purchaser of machines; on the contrary, it stipulates expressly that machines were to be consigned to him, to be sold or leased as the property of the consignor, and that such as should remain unsold should be returned to the company at the termination of the agency. Plainly then the sureties were not liable to pay the judgment recovered on the note given for the machine sold after the agency terminated. It could be claimed with as much reason that the bond was a security for a loan of money, or any other transaction wholly disconnected from the agency, as that it covered the sale of these machines.

The sureties are not liable for the payment of the notes taken in settlement of the agent's account. The contract of agency provides for no contingency in which the agent was to execute his notes to the sewing machine company. He

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was to receive consignments of machines, and sell or lease them, as the property of his principal. He was authorized to receive on such sales, either cash or the notes of the purchaser payable to the company. If he took notes, his contract required him to endorse them, and to transmit the cash and notes, less his commissions, weekly, to his principal. For any failure to pay notes thus endorsed, or to account for and pay over cash received, the sureties were liable on the bond. For the payment of notes so taken and endorsed by the agent, or for renewals, extensions, etc., of such notes, the bond was a continuing guaranty, as it was, also, that the agent would faithfully account for and pay over the cash which he should receive upon sales or leases.

It will be observed, the notes were governed by the law merchant. They were taken, as the jury find, in settlement of the account of the agent. Without determining whether or not the implication arises from this, that the account was thereby paid or extinguished, the notes were at least obligations different from those provided for in the original contract.

The non-payment of these notes and the judgment against Sale, is assigned in the complaint as the breach of the bond, thereby authorizing the inference that the account was regarded by the plaintiff as liquidated and merged, if not entirely extinguished.

It thus appears that the sureties are sought to be held for the failure of their principal to discharge new obligations, not contemplated by the contract to secure the performance of which the bond was given. Into these are imported new terms. They suspended the right of the creditor to proceed against the principal to collect the original liability, in settlement of which they were given. Because they are new obligations, different in character from those, the performance of which was guaranteed by the bond, the sureties are not liable for their payment. *Weed Sewing Machine Co. v. Oberreich*, 38 Wis. 325; *Haskell v. Burdette*, 35 N. J. Eq. 31;

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Victor Sewing Machine Co. v. Scheffler, 61 Cal. 530; *Brandt Suretyship and Guar.*, sections 316, 317.

Guarantors and sureties are exonerated if the creditor by any act, done without their consent, alters the obligation of the principal in any respect, or impairs or suspends the remedy for its enforcement.

Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and upon terms different from those imposed by the original agreement, such new contract presumptively merges the old. In such a case, the new obligation, having been taken upon a sufficient consideration, becomes the exclusive medium by which the rights of the parties in respect to the payment of damages are to be ascertained. Such a contract is not collateral to the original, but in respect to the subject to which it appertains, it merges and supersedes the other. *Bailey v. Boyd*, 75 Ind. 125.

The case is clearly distinguishable from *Lindeman v. Rosenfeld*, 67 Ind. 246 (33 Am. R. 79).

Without considering other grounds upon which it is claimed the sureties were legally exonerated, upon the reasons already given the judgment is affirmed, with costs.

Filed June 15, 1886; petition for a rehearing overruled Sept. 15, 1886.

No. 9456.

SANDERS v. WHEELBURG, EXECUTRIX.

SURETYSHIP.—Contribution.—Claim for Against Decedent's Estate Triable by Jury.—A claim for contribution by a surety against the estate of a deceased co-surety is triable by jury.

SAME.—Security Held by One Surety Enures to Benefit of All.—Trust.—Where one surety obtains a security, it enures at once to the benefit alike of

07	200
35	500
36	172
107	200
128	187
128	200
07	200
36	20
107	200
143	334

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himself and his co-surety. He occupies the position of a trustee for his co-surety, and can not deal with the fund to the prejudice of the latter.

SAME.—*Purchase at Judicial Sale by One Surety of Principal's Property.—Rights of Co-Surety.*—Where one surety, having paid a judgment for which he and his co-surety are liable, sues out execution thereon and procures the sale of the principal's property, which he purchases at comparatively nominal prices, and then sues his co-surety for contribution, the latter may show, in bar of the suit, that such property of the principal, at its fair value, was sufficient to satisfy the judgment.

PRACTICE.—*Special Finding.—Judgment Non Obstante.*—A judgment notwithstanding the general verdict will not be rendered on a special finding of facts which is vague and indefinite, and not so inconsistent with the general verdict as to control it.

SAME.—*Presumptions.*—All reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings.

From the Marion Circuit Court.

A. F. Denny, for appellant.

A. C. Ayres and E. A. Brown, for appellee.

Howk, C. J.—This was a claim in favor of the appellant and against the appellee, as the executrix of the last will of Henry Weelburg, deceased. The claim was founded on a judgment, which it was alleged that one Will. F. A. Bernhamer, administrator, etc., recovered on the 29th day of January, 1879, in the Marion Superior Court, against one Frederick Weelburg, as principal, and against the appellant and the appellee, executrix, etc., as co-sureties, for the sum of nineteen hundred and fifty-seven dollars and twenty cents, and bearing interest at eight per cent. per annum. The appellant stated in his claim or complaint that, as one of such co-sureties, on and before the 9th day of April, 1879, he paid on said judgment the aggregate sum of eighteen hundred and eleven dollars and fifty cents, "in full of the balance of said judgment, interest and costs," and the execution then outstanding, as to him, was returned satisfied; that on the 10th day of April, 1879, an execution was issued on said judg-

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ment, in favor of the appellant as such co-surety, and delivered to the sheriff of Marion county; that by virtue of said execution, the sheriff, on April 16th, 1879, levied on certain property of Frederick Weelburg, the principal in said judgment, which property the sheriff, on April 26th, 1879, sold to the appellant for the sum of \$378, of which sum, after the payment of costs, there was credited on the judgment the sum of \$359.52; that on May 1st, 1879, by virtue of the same execution, the sheriff levied on certain real estate and leasehold interests of Frederick Weelburg, the principal in said judgment, which property the sheriff, on May 31st, 1879, sold to the appellant for \$50, of which sum, after the payment of costs, there was credited on the judgment the sum of \$43.20; that on July 14th, 1879, the sheriff sold on the same execution to the appellant, for the sum of \$28.29, certain personal property of Frederick Weelburg, the principal in said judgment, of which sum \$21 was credited on the judgment; and that, on April 2d, 1880, the execution was returned no other property found of Frederick Weelburg, principal in the judgment, whereon to levy. Upon the foregoing facts, the appellant claimed that there was due him, by way of contribution, from the appellee, executrix, etc., as his co-surety in the above described judgment, the sum of \$700, and eight per cent. per annum interest thereon after the 13th day of March, 1879.

The cause was tried by a jury, and a general verdict was returned for the appellee, the defendant below. Over the appellant's motions for judgment in his favor on the special findings of the jury, and for a new trial, the court rendered judgment for appellee on the general verdict.

The appellant has assigned as errors the following decisions of the circuit court:

1. In permitting the cause to be tried by a jury over his objections;
2. In overruling his motion for judgment in his favor on

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the special findings of the jury, notwithstanding their general verdict; and,

3. In overruling his motion for a new trial.

We will consider and decide the several questions presented by these alleged errors in the order of their statement.

1. No sufficient reason occurs to us, and none has been suggested by appellant's learned counsel, why this cause should not have been tried as it was by a jury, at the request of the appellee. We have given the substance of appellant's claim or cause of action, and it will be seen therefrom that he has sued simply to recover money alleged to be due him, by way of contribution, from appellee's decedent as his co-surety. Like all other claims against a decedent's estate, for a money demand merely, the case in hand was properly triable by jury, upon the request of either of the parties, plaintiff or defendant. The court did not err, therefore, in permitting this cause to be tried by a jury, over appellant's objections.

2. The second error, of which appellant complains, is the overruling of his motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict. It is shown by the record that, with their general verdict for the appellee, the jury also returned into court their special findings on two questions of fact, submitted to them by appellant under the direction of the court, in substance, as follows:

"1. Are the facts in the statement, annexed to the claim or complaint herein, marked 'Exhibit A,' down as far as the conclusion thereof, commencing with the words—'at the date of filing this claim,'—true?" Answer: "Yes."

"2. Has any money, other than the sums realized from the sheriff's sales, specified in such 'Exhibit A,' ever been paid to the plaintiff, Sanders, on the said judgment?" Answer: "No."

It is certain, we think, that the trial court committed no error in overruling appellant's motion for judgment in his

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favor, on the facts specially found by the jury, notwithstanding their general verdict against him. The facts found by the jury, in answer to appellant's interrogatories, were entirely too vague, indefinite and uncertain to constitute a sufficient basis for any judgment, and certainly were not so inconsistent with the general verdict, as that they would necessarily control the latter and authorize the court to give judgment accordingly. Section 547, R. S. 1881. In such a case, of course, under repeated decisions of this court, the general verdict must stand and judgment must be rendered thereon. *Amidon v. Gaff*, 24 Ind. 128; *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293; *Woollen v. Wishmier*, 70 Ind. 108; *Carver v. Leedy*, 80 Ind. 335; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412. In determining the questions presented by a motion for judgment on the special findings of the jury, notwithstanding their general verdict, we have uniformly held that all reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of such special findings. *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442; *Lassiter v. Jackman*, 88 Ind. 118; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88.

It follows from what we have said, that the second error, of which appellant complains, is not well assigned and will not authorize the reversal of the judgment.

3. The important and controlling questions in this cause arise under the third alleged error, namely, the overruling of appellant's motion for a new trial. In this motion, many causes were assigned for such new trial, consisting chiefly of alleged errors of law occurring at the trial. There is but little, if any, controversy between the parties and their counsel, as we understand them, in regard to the actual facts of this case; but the controverted and disputed questions between them are, for the most part, in relation to the rules of law or equity which are applicable to such facts, and which must govern and determine their rights and liabilities re-

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spectively. We will consider and decide these controverted and disputed questions without especial reference to any of the causes assigned by appellant in his motion for a new trial.

Appellant shows in his complaint, as we have seen, that he and the appellee were co-sureties of one Frederick Weelburg, as principal debtor, in a certain judgment rendered against all of them, on January 29th, 1879, in and by the superior court of Marion county; that, on April 9th, 1879, appellant paid the balance then due of such judgment, interest and costs, to wit, the sum of \$1,811.50; that, on the next day, April 10th, 1879, an execution was issued on such judgment in favor of appellant, as such co-surety, and delivered to the sheriff of Marion county; that, by virtue of such execution, such sheriff offered and sold to appellant certain property of the principal debtor, on April 26th, 1879, for \$378, and, on May 31st, 1879, certain real estate and leasehold interests of such principal debtor, for \$50, and, on July 14th, 1879, certain personal property of the principal in such judgment, for \$28.29; and that, on April 2d, 1880, such execution was returned, no other property found of Frederick Weelburg, principal in such judgment, whereon to levy. On such several sales to appellant, his complaint shows that he paid the costs and credited the remainder of his several bids on the judgment.

After his several purchases of the property of Frederick Weelburg, principal in such judgment, and after he had credited the judgment with the net amounts of his several bids for such property, as stated in his complaint, appellant filed his claim herein to recover of the appellee, as his co-surety in such judgment, by way of contribution, the sum of \$700 and interest thereon at the rate of eight per cent. per annum from and after March 13th, 1879. It is claimed on behalf of the appellant, that he purchased the property of the principal in the judgment, at public sales thereof by the sheriff of the county, where all parties, the appellee included, had the right to appear and bid therefor; that he had the lawful

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right to purchase such property, at such sales, and as no one would or did bid more therefor than he, to purchase the same at and for the amounts of his several bids, without regard to the actual value thereof; and that, having so purchased such property, he can not be required to account therefor even to the appellee, as his co-surety, at its actual value, or at any greater value than the aggregate amount of his several bids.

On the other hand, it is claimed on behalf of appellee that, as she was the co-surety of appellant in such judgment, equity, good conscience and fair dealing exacted of him the utmost good faith in his transactions with her in relation to the judgment, and in connection with the property of the principal in such judgment; that as the judgment was a common burden to her and appellant, as such co-sureties, so the property of the principal in the judgment became and was a common fund for the benefit and protection alike of each and both of them; that by suing out and delivering to the sheriff of the county an execution on such judgment, in appellant's favor, he acquired a security for the payment of the judgment, by the lien of the execution on the property of the principal therein, which security enured to the benefit and for the protection of the appellee, as his co-surety; that by appellant's acts in procuring forced sales of such property of the principal in the judgment, and in becoming the purchaser thereof at prices relatively nominal, the value of such security became and was largely depreciated, if not wholly lost; and that, by means of the premises, appellant became and was justly chargeable with the fair and reasonable value of such security to the appellee, as his co-surety, in the equitable adjustment of appellant's claim herein to contribution.

These conflicting claims of the parties respectively involve, as it seems to us, the entire merits of the controversy in this cause. If appellant is right in his claim or contention, as we have heretofore stated it, the general verdict for appellee is wrong, and the judgment thereon can not stand, but must be reversed, because the record before us clearly shows that

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the case was tried below upon a theory which antagonizes and is irreconcilable with appellant's claim or contention. If, on the other hand, appellee's claim or contention, as it is heretofore stated, is the correct one, as we think it is, the general verdict is right upon the evidence, and the judgment below must be affirmed. It is abundantly shown by the evidence in the record, that the fair and reasonable value of the property of the principal in the judgment, which was levied upon and sold by the sheriff upon the execution in favor of appellant, and of which he became the purchaser as aforesaid, largely exceeded in the aggregate the full amount due him on such judgment, of principal, interest and costs.

Appellant, having fully paid and satisfied the judgment to the judgment creditor or plaintiff, by means of such payment, acquired at the time a cause of action against the appellee, as his co-surety in such judgment; but in his suit on such cause of action, it is clear, we think, that, under our law, he could not recover of the appellee any more than she was "equitably bound to pay." *Prima facie*, appellee as the co-surety of appellant was liable to him for the one-half of the sum paid by him to the judgment plaintiff, in satisfaction of such judgment; but this *prima facie* liability was subject to reduction by whatever sums could be realized from the property of the principal in such judgment. The property of the principal in the judgment was a common fund for the benefit and protection of both the sureties alike, the appellee as well as the appellant. By his payment of the judgment to the judgment plaintiff, appellant became and was practically, at least, the owner thereof, and was fully authorized to sue out execution thereon for his own use, under the provisions of section 1214, R. S. 1881. The judgment was then a lien on the real estate and chattels real of the principal therein; and when, on the next day after his payment of such judgment, appellant sued out an execution thereon, in his own favor, and delivered the same to the sheriff of the county, he thereby

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acquired a valid lien on all the personal property of such principal. These liens upon the real and personal property of the principal in the judgment were a security which appellant had acquired and held as aforesaid; but such security enured in equity to the benefit and for the protection of the appellee, as the co-surety of appellant in such judgment.

In Sheldon on Subrogation, section 143, the law on the subject under consideration is thus stated: "When one of two or more co-sureties obtains in any manner a security for the payment of the debt, he does this for the benefit of all the sureties; he is a trustee for his co-sureties as to such security, and is held for them to the duties which arise from that relation, and must do no act, or voluntarily omit to do any act, by which such security will be depreciated or lost, but must faithfully apply it to the payment of the debt; or he will be chargeable to his co-sureties with the amount of the security, in the adjustment of their proportions of the debt." The language quoted and the doctrine declared are fully supported by the numerous authorities cited in the footnotes by the learned author.

In *Hall v. Robinson*, 8 Ired. (N. C.) 56, it was held by the Supreme Court of North Carolina, that an action for contribution is an equitable one, "in which nothing can be recovered but what *ex æquo et bono*, the defendant ought to pay." The court says: "The relief between co-sureties in equity proceeds upon the maxim, that equality is equity; and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it, that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all."

In *Owen v. McGehee*, 61 Ala. 440, it was held by the Supreme Court of Alabama, that whenever persons stand in such relation to a common burden, that contribution between them may be compelled, neither can speculate on the com-

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mon liability, and whatever benefits or advantages are acquired by one, in dealings with the common creditor, enure equally to the benefit of all.

In *Schmidt v. Coulter*, 6 Minn. 492, it was held by the Supreme Court of Minnesota, that where one of two or more co-sureties obtains in any manner a security for the debt, he holds it for the benefit of all the other sureties, and if, by any act or omission on his part, such security becomes depreciated or lost, he will be chargeable with the amount of such security in an adjustment with his co-sureties of their several proportions of the debt. So, in *Comegys v. State Bank*, 6 Ind. 357, it was held by this court that sureties are entitled to the benefit of all securities, which have been taken by any one of them to indemnify himself against their joint liabilities. Story Eq. Jurisprudence (13th ed.), section 499, *et seq.*

Where one surety obtains a security, it enures at once to the benefit alike of himself and his co-surety. He can not deal with such security to his own advantage, and to the prejudice of his co-surety, without consulting the latter and without his assent. He occupies the position of a trustee for his co-surety, and can not deal with the fund to the prejudice of the latter, without his authority or consent. In such case, where the surety has it in his power, for his own advantage, to sacrifice the common fund which, in good conscience, he is bound to protect, the general doctrine is that he will not be permitted to avail himself of any such advantage to his own profit, and to the loss and detriment of his co-surety.

We do not decide, in this case, that appellant did not have the right to sue out execution on the judgment, and procure the sale by the sheriff of the principal's property; for this right he clearly had. What we do decide is that if the appellant, at such sales, purchased the property of the principal, at comparatively nominal prices, and then sued his co-surety for contribution, she had the right, in bar of such suit,

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to show, as she did, that such property, at its fair value, was more than sufficient to satisfy such judgment.

Applying the law as we have stated it to the case under consideration, as made by the evidence appearing in the record, we are of opinion that the jury reached a right conclusion in their general verdict. The cause seems to us to have been fairly tried on its merits, and a right result was arrived at, we think, in the circuit court. In such a case errors in relation to the instructions, if any were committed, would not authorize the reversal of the judgment; for our statute imperatively requires, "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," that the judgment shall not "be stayed or reversed, in whole or in part." Section 658, R. S. 1881. *Norris v. Casel*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Daniels v. McGinnis*, 97 Ind. 549; *Perry v. Makemson*, 103 Ind. 300.

Our conclusion is that the court committed no available error in overruling appellant's motion for a new trial of this cause.

The judgment is affirmed, with costs.

Filed June 5, 1886; petition for a rehearing overruled Sept. 15, 1886.

No. 11,979.

DAGGETT v. BONEWITZ ET AL.

SCHOOL LANDS.—*Grant of Section Sixteen to Townships.*—*Seizin.*—The act of Congress of April 19th, 1816, granting section number sixteen in each township to the inhabitants thereof for the use of the schools, vested an immediate seizin.

SAME.—*Patent.*—*When Not Effective.*—A patent to land previously disposed of by the government is without effect.

SAME.—*Acceptance of Grant.*—*Withdrawal.*—A grant of lands by the government can not be withdrawn after acceptance.

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SAME.—Substitution of Other Lands.—An attempted substitution by public officers of other lands for those in section sixteen would be without effect, except where the lands in that section had been disposed of by the government previous to the grant for school purposes.

CONTRACT.—Binding Upon Nation as well as Citizen.—The Nation is as much bound by a contract as an individual citizen.

PUBLIC OFFICER.—Certificate.—Recital of Facts Not of Record.—A public officer may certify as to matters contained in the records of his office, but he can not recite facts not appearing of record.

From the Knox Circuit Court.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellant.

H. S. Cauthorn, J. M. Boyle, T. R. Cobb, O. H. Cobb and J. T. Goodman, for appellees.

ELLIOTT, J.—The appellant asserts title to the land in controversy, upon a patent issued by the United States to his immediate grantor, on the 15th day of May, 1877.

The appellees claim title to the land under the act of Congress enabling the people of the territory of Indiana to form a State government, adopted April 19th, 1816. That act, among other things, provides, "That the section numbered sixteen, in every township, and when such section has been sold, granted or disposed of, other lands, equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." The land in dispute is in section sixteen, township number two north, of range eight west. In 1851, a petition for the sale of the land in section sixteen was presented to the board of commissioners of Knox county, and a sale of the land ordered. Under this order a sale was made and a deed executed by the auditor of the county.

As it appears that the land is in section numbered sixteen, and that it was accepted as school land prior to the issue of the patent under which the appellant claims, a *prima facie* title was made out by the appellees, and unless this title has been defeated this appeal must fail. The grant made to the

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State by the Federal government vested an immediate seizin in the grantee. *Fletcher v. Peck*, 6 Cranch, 87; *Cooper v. Roberts*, 18 How. 173; *Schulenberg v. Harriman*, 21 Wall. 44; *State v. Springfield Tp.*, 6 Ind. 83; *Proprietors of Enfield v. Permit*, 8 N. H. 512 (31 Am. Dec. 207).

The effect of this grant can only be defeated by evidence that the land in section sixteen did not pass under the act of April 19th, 1816, and it seems to us that this could only be done by evidence that the land in section sixteen had been "sold, granted or disposed of" prior to that time. The act operates upon all land not "sold, granted or disposed of," in any section numbered sixteen, and we can not perceive any ground upon which it can be justly held that land in such a section owned by the United States did not pass to the inhabitants of the township. The public officers had no authority to take or grant other lands than those indicated in the act of Congress, and by virtue of that act the title to every section sixteen not previously disposed of vested immediately in the inhabitants of the township. *State v. Portsmouth Savings Bank*, 106 Ind. 435. The act of Congress does not vest authority in any officer to make a selection of lands, but, in express terms, grants every section sixteen, so that it conveys the land at once, for there is no act to be done to determine what lands are granted. The grant is complete and perfect in itself.

If we are correct in affirming that the act of Congress at once vested a title to section sixteen in the inhabitants of the township, then the patent issued in 1877 is without force, for it is settled that a patent is of no effect if it appears that the land described in it has been previously disposed of by the government. *United States v. Carpenter*, 111 U. S. 347; *Wilcox v. Jackson*, 13 Peters, 516; *Doe v. Watts*, 45 Am. Dec. 308.

It is perfectly clear that where a public law grants lands to the inhabitants of a township for school purposes, no officer, however high his station, can defeat the legislative

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grant. It is difficult, therefore, to perceive any other way of defeating the claim to lands in section sixteen than by showing that they were disposed of prior to April 19th, 1816, for it is only the lands in section sixteen previously disposed of that did not immediately vest under the act of Congress of that date. Even if the officers had undertaken to substitute lands for those in section sixteen, their acts would be without effect, unless it appeared that the lands in that section had "been sold, granted or otherwise disposed of."

The evidence relied on by the appellant to prove that other lands were substituted for those in section sixteen, is a letter written by John Badollet, the register of the land-office at Vincennes, in June, 1821, but there are at least two reasons why this letter is not competent to establish the fact that the lands in that section were disposed of and others substituted for them. The first of these reasons is, that the provisions of the act of Congress of April 19th, 1816, were accepted by the representatives of the State on the 29th day of June of that year, and after this acceptance the grant could not be withdrawn. R. S. 1843, 36. Section sixteen had, therefore, fully vested in the township prior to Mr. Badollet's letter of June, 1821, and the grant bound both the Federal and State governments. Where the Nation enters into a contract it is as much bound as an individual citizen. *Lessieur v. Price*, 12 How. 59; *Murray v. Charleston*, 96 U. S. 432; *Gray v. State, ex rel.*, 72 Ind. 567. It was, therefore, necessary for the appellant to prove that the grantee had assented to the substitution. The second reason is, that a mere recital of a past occurrence in a letter is not evidence to prove that it actually occurred. A public officer may doubtless certify as to matters contained in the records of his office, but he can not recite facts not appearing of record. 1 Greenleaf Ev., section 498. The recital in Mr. Badollet's letter was, consequently, nothing more than the statement of an individual and was unsworn testimony, and to this infirmity must be added the further one that it is mere hearsay evidence.

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The instructions of the trial court were correct, but the case is so plainly with the appellees, on the evidence, that we could not reverse even if they had been wrong.

Judgment affirmed.

NIBLACK, J., was not present when this case was considered.

Filed June 22, 1886; petition for a rehearing overruled Sept. 15, 1886.

No. 12,397.

BRADFORD v. THE SCHOOL TOWN OF MARION.

REVIEW OF JUDGMENT.—*New Trial as of Right.*—*Pleading.*—*Copy of Judgment.*—A complaint to review a judgment for error in setting aside an order granting a new trial as of right, and reinstating the original judgment, should set out a copy of such original judgment.

NEW TRIAL AS OF RIGHT.—*When Not Proper.*—*Different Causes of Action.*—Where a litigation proceeds to judgment on any substantive cause of action, in which a new trial as of right is not allowable, then, even though it embraces other causes in which a new trial as of right is allowable, a new trial as of right is not proper.

From the Grant Circuit Court.

A. Steele, R. T. St. John and I. VanDevanter, for appellant.
W. L. Lenfesty and R. W. Bailey, for appellee.

MITCHELL, J.—This was a proceeding to review a judgment of the Grant Circuit Court, for alleged error of law appearing on the face of the record. A demurrer was sustained to the complaint, and this ruling presents the only question for decision.

On the 12th day of May, 1882, Bradford commenced a suit against the School Township of Marion. His complaint, a copy of which is set out in the bill for review, was in three paragraphs. The first and second were actions to recover possession of, and quiet the title to, certain lots, which the plaintiff averred he had conveyed to the school corporation upon certain conditions, which it was charged had been vio-

107	280
186	507
107	280
129	290
107	280
186	507
186	507
107	280
138	551
107	280
140	471
141	314
107	280
150	93
150	607
107	280
168	9

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lated, and the violation of which had revested the plaintiff with the title to the lots in question. The third paragraph was an action for damages for the breach of the conditions previously mentioned.

The defendant answered by a general denial, and, by way of cross complaint, set up the conveyance from the plaintiff to it, claimed ownership and right of possession, and asked to have its title to the lots quieted.

Upon issues made on the complaint and cross complaint a trial was had. The school township recovered judgment against Bradford at the November term, 1882, of the Grant Circuit Court. There is no record entry of the judgment set out with the complaint for review. On the 12th day of April, 1883, Bradford applied for a new trial as of right. Afterwards—the complaint does not show how long—the application was allowed and the new trial granted. The case was tried again in the April term, 1884, and judgment rendered for Bradford. At the same term of court the school corporation made an application to have the order granting the new trial as of right set aside, and the original judgment in its favor reinstated. This motion was sustained, and the judgment accordingly reinstated as prayed for. Setting aside the order granting the new trial, and reinstating the original judgment, is the error for which the review was asked.

The record fails to disclose the character of the original judgment. The complaint for review charges that it was rendered on the cross complaint. We can not tell from an inspection of the record whether it was an adjudication upon all the issues presented by the several paragraphs of the complaint and cross complaint or not. The very thing complained of, and for which a review was asked, was that the court erred in granting a new trial as of right. It was therefore indispensable that a copy of the judgment which was vacated by the new trial, and reinstated by setting aside the order granting the new trial, should have been set out in the complaint for review.

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Whether the order granting the new trial was properly set aside, depends upon whether the judgment was an adjudication of the issues tendered by the several paragraphs of the complaint, as well as those tendered by the cross complaint. If the judgment was for the defendant generally, and was an adjudication of all the issues presented, then, since the parties saw fit to litigate causes of action which were improperly joined, in some of which either party would have been entitled to a new trial as of right, with an action for damages, in which a new trial as of right was not allowable, the order granting a new trial was improperly made, and that which set it aside was correct.

Doubtless, if the paragraph counting upon damages for breach of the conditions contained in the deed had been dismissed, or if the record had shown that it was abandoned or withdrawn, the case would then have been within section 1064, R. S. 1881, authorizing new trials as a matter of right. So long, however, as the paragraph for damages remained a feature of the litigation, that paragraph controlled as respects the subject of a new trial.

The rule was well stated in *Butler University v. Conard*, 94 Ind. 353. The result of which is, that where a litigation proceeds to judgment on any substantive cause of action, in which a new trial is not allowable as a matter of right, then, even though it embraces other causes in which a new trial as of right is allowable, the policy of the law is to allow that cause of action to control in which a second trial is not permitted as a matter of right. The logical conclusion to which this rule leads is, that a new trial was not allowable as of right in the case under review, and the order setting aside the ruling by which a new trial as of right was granted was properly made. *Williams v. Thames Loan and Trust Co.*, 105 Ind. 420; *Jenkins v. Corwin*, 55 Ind. 21. There was no error.

The judgment is affirmed, with costs.

Filed June 2, 1886; petition for a rehearing overruled Sept. 15, 1886.

Castor v. Jones.

No. 12,864.

CASTOR v. JONES.

REAL ESTATE, ACTION TO RECOVER.—*Plaintiff Must Succeed on Strength of His Own Title.*—In an action to recover the possession of real estate the plaintiff must recover, if at all, on the strength of his own title.

SAME.—Will.—Title.—Widow's Right to Possession.—A testator devised land to R. to have and hold and have full use and possession of during the natural life of the testator and his wife. R. was to have all the testator's property at the death of the latter and his wife. He was to live on the farm with the testator and to comply with the will "during the natural lifetime of myself and said wife." Immediately following the devise to R. during the natural life of the testator and wife was the following provision: "For and in consideration of the above said R. is to take care of me and of my wife during our natural lifetime, and be at all expense every way in doctoring and funeral expenses." The testator's wife survives him.

Held, that the devise to R. will not take effect, so as to vest in him a fee simple title, until the death of the widow.

Held, also, that neither R., nor any one claiming through him, can, by any right given in the will, maintain an action to oust the widow from the land, but that she is entitled to possession during her life.

From the Montgomery Circuit Court.

G. D. Hurley, B. Crane and A. B. Anderson, for appellant.

P. S. Kennedy, S. C. Kennedy, B. F. Ristine, T. H. Ristine and H. H. Ristine, for appellee.

Howk, J.—This was a suit by the appellee against appellant Amy Castor to recover the possession of certain real estate in Montgomery county, and damages for its detention. Appellee also made Allen Rhodes and John Rhodes defendants to his action, but they answered by a disclaimer of any right to or interest in the real estate described in his complaint, and thereafter were apparently dropped from the case. Amy Castor answered by a general denial of each and every material allegation of appellee's complaint. The issues thus joined were finally tried by the court, on the 25th day of June, 1885, and a finding was made that appellee was the owner and entitled to the immediate possession of the real

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estate described in his complaint, and was entitled to recover of Amy Castor the sum of \$1,600 for his damages for being kept out of possession of such real estate. Over appellant's motion for a new trial, the court rendered judgment against her upon and in accordance with its finding herein.

Errors are here assigned by the appellant, upon the record of this cause, which call in question the overruling (1) of her motion for a new trial, (2) of her exceptions to the form and substance of the judgment herein, and (3) of her written motion to modify such judgment.

In her motion for a new trial, appellant assigned as causes therefor, *inter alia*, (4) that the finding of the trial court was not sustained by sufficient evidence, (5) that such finding was contrary to law, (6) that the court erred in refusing to find that the right and title of appellee Jones to the land in controversy were subject to the rights and provisions of the will of Isaac Castor, in favor of appellant Amy Castor, and (7) that the damages assessed against appellant Amy Castor were excessive, the same being too large. We are of opinion that each one of these causes for a new trial is well assigned, and that, for each and all of such causes, appellant's motion for such new trial was well made and ought to have been sustained.

The case in hand, as it is presented by the record before us, is a peculiar one in many particulars. Each of the parties to the record filed in this court, appellee as well as appellant, claims to derive all the interest which he or she has or asserts in the real estate described in the complaint herein, from a common source, namely, the last will and testament of Isaac Castor, deceased, the late husband of appellant Amy Castor. This last will is *sui generis*, and is fully as peculiar as the case under consideration. This will has been, in several cases, considered and construed by this court in such a manner and to such an extent that its testamentary character and its validity as a will can be no longer regarded as open

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questions. *Jones v. Rhoads*, 74 Ind. 510; *Castor v. Jones*, 86 Ind. 289.

In the case last cited, the will of Isaac Castor was very carefully considered, and in the opinion of the court in that case, wherein the appellant and appellee, in the cause now before us, were then parties, the provisions of such will, which ascertain and determine, we think, the rights and interests of the parties respectively in the land now in controversy, were quoted at length and fully construed. We need not set out these testamentary provisions here, but by reference thereto, as they appear in the opinion in the case last cited, it will be seen that Isaac Castor devised the land in controversy herein to his son-in-law, Daniel Rhodes, "to have and hold and have full use of, in every way, during the natural life of myself and wife, Amy Castor;" that said Rhodes was "to have full and free possession of said property during the natural lifetime of myself and wife;" that said Daniel Rhodes was "to have all my property, both real and personal, at the death of myself and wife;" and that said Rhodes was "to live on said farm and in said house with me," and was "to comply with such will during the natural lifetime of myself and said wife." Immediately following the devise of the land in controversy to Daniel Rhodes, "during the natural life of myself and wife, Amy Castor," the last will of Isaac Castor contains this provision: "For and in consideration of the above, said Rhodes is to take care of me and of my wife, Amy, during our natural lifetime, and be at all expense every way in doctoring and funeral expenses."

In his complaint in this cause, the appellee alleged that he was the owner in fee simple, and entitled to the possession, of the real estate in controversy, and that appellant had possession thereof without right, and had unlawfully kept him out of possession for the six years then last past. Upon these allegations, appellant joined issue by her answer in general denial. Upon the trial of the cause, of course, the

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appellee had the burden of the issue. He could only recover, if he recovered at all, by the strength of his own title, and not by reason of any defect or weakness, real or imaginary, in the appellant's title. This is elementary law, but it has always been approved by this court. In *Shipley v. Shook*, 72 Ind. 511, a case like the one now before us for the recovery of real estate, the court said: "It is an ancient and invariable rule, that, in actions of this kind, the plaintiff must recover, if at all, on the strength of his own title."

Applying this rule to the case in hand, we have no difficulty in reaching the conclusion that the evidence appearing in the record wholly fails to sustain the averments of appellee's complaint. It is shown by the record that appellee claimed to derive his title to the land in controversy under a mortgage thereon executed to him by Daniel Rhodes and his wife, a decree of the Montgomery Circuit Court foreclosing such mortgage, a sale of the land under such decree to appellee and a sheriff's deed to him in pursuance of such sale, and from no other source. For the purpose of showing, as we may suppose, that the mortgagor, Daniel Rhodes, had title to the land in suit, appellee also put in evidence the last will of Isaac Castor and the probate thereof. But this item of evidence did not prove, nor tend to prove, that Daniel Rhodes was, at the time of the execution of the mortgage, or had since become, the owner in fee simple of the land in controversy; and no evidence was offered or introduced for the purpose of showing that Rhodes ever had any claim to or interest in such land except such as he had acquired, or might acquire, under the last will of Isaac Castor. It is manifest, we think, from the provisions of such will, that the testator intended to provide appellant, Amy Castor, during her natural life with a home in the house on the farm, and to charge the land with the proper care of his wife, Amy, and with the expense of "doctoring" her during life, and the expenses of her funeral after death. Whatever rights or interest the will may have given Daniel Rhodes in or to the land in contro-

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versy, after the death of the testator, it is certain, we think, that it gave him no such right or interest therein as would have authorized or empowered him to maintain an action to oust or exclude Amy Castor from such land or from her home in the farm-house of the testator during her natural life. She is lawfully in the possession of the land and farm-house, and, while she lives, has the lawful right to remain in such possession, without let or hindrance of or from Daniel Rhodes, or of or from any one claiming under him.

We are not required to decide, in the case under consideration, what rights or interest, if any, the appellee has acquired in the land in controversy, under his mortgage from Daniel Rhodes, or its foreclosure, or the sheriff's sale and conveyance to him of such land, under the mortgage. It is enough for us to decide, as we do in this case, that, by the express terms of Isaac Castor's will, the devise of the land to Daniel Rhodes has not taken effect, and, until the death of Amy Castor, will not take effect and become operative so as to vest a fee simple title to such land, either in Rhodes or in any one claiming under him. As we have seen, however, appellee has sued in this action alleging that he is the owner in fee simple of the land in controversy. In such a case, whatever rights, interests or equities, if any, the appellee might have in the land in controversy, he could only recover, if he recovered at all, by proving that he held the fee simple title to the land when he commenced this suit. This he has not done and can not do, if he ever can, while Amy Castor lives. *Rowe v. Beckett*, 30 Ind. 154; *Stout v. McPheeters*, 84 Ind. 585; *Deputy v. Mooney*, 97 Ind. 463.

For the reasons given we are of opinion that the trial court clearly erred in overruling appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded for a new trial and further proceedings not inconsistent with this opinion.

Filed May 15, 1886; petition for a rehearing overruled Sept. 15, 1886.

The National Benefit Association of Indianapolis v. Grauman.

No. 12,061.

THE NATIONAL BENEFIT ASSOCIATION OF INDIANAPOLIS v. GRAUMAN.

LIFE INSURANCE.—Benefit Association.—Notice and Proof of Death.—Pleading.—Where a complaint to recover a death benefit does not explicitly aver notice and proof of the kind required by the certificate, but the facts pleaded are such that the inference necessarily arises that such notice and proof were furnished, the complaint is not bad.

SAME.—Limitation of Risk to Death Caused by Injury.—Complaint.—Where the risk is limited to a case of death proximately caused by physical injuries of which there shall be some visible external sign, the complaint must make such a case; but the fact that the injury produced apoplexy does not render it any less the cause of death.

SAME.—Statements in Application.—Warranties.—Burden of Proof.—The burden is on the insurer to prove the untruth of the statements made by the deceased in his application.

INSTRUCTIONS TO JURY.—Refusal to Give Instruction Asked.—It is not error to refuse to give an instruction asked, where those given by the court sufficiently cover the subject embraced therein.

From the Marion Superior Court.

S. M. Shepard, J. B. Elam, C. Martindale and J. Buchanan,
for appellant.

J. S. Duncan, C. W. Smith, J. R. Wilson, R. Hill and W. H. Murtz, for appellee.

MITCHELL, J.—This action was brought by Minnie Grauman on a certificate of membership issued by the National Benefit Association of Indianapolis, to Isadore Grauman.

It was stipulated in the certificate that the sum represented thereby should not exceed five thousand dollars, which sum was to be paid to Minnie Grauman within sixty days after the receipt of satisfactory proofs that Isadore Grauman had sustained, during the continuance of his membership, bodily injuries, effected through external, violent and accidental means, which had occasioned his death within six months from the happening of such injuries.

To each of the two paragraphs of the complaint a separate demurrer was overruled. This ruling is assailed on two

107	288
134	607
107	288
137	91
107	288
158	507
107	288
165	60
165	320
107	288
166	371

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grounds. It is said the complaint is insufficient, because it is not averred in either paragraph that satisfactory proof of the death of Isadore Grauman was furnished sixty days before bringing the suit.

It is averred in each paragraph of the complaint, substantially, that on the 28th day of April, 1882, upon a blank furnished by the association for that purpose, notice in writing was furnished of the injury and death, and that thereafter, at the request of the association, other proofs and notice were furnished, which were to be, and were, substituted in place of the notice and proof originally forwarded. Coupled with the further averment which follows, to the effect that the defendant has wholly failed, and still fails and refuses, to comply with the terms and conditions of the certificate on its part by refusing to pay, the averment is sufficient.

It should have been averred explicitly that notice and proof had been made sixty days before the commencement of the suit, or that the plaintiff had performed all the conditions on her part to be performed. An attempt was however made to aver notice and proof according to the requirements of the contract, following which it is charged that the defendant was then in default for not having paid according to the conditions of the certificate. As the defendant could not have been in default, in the absence of such proof as the contract stipulated for, the inference necessarily arises that the proof furnished was such as the certificate required.

The other objection urged against the complaint is that it fails to aver that the death of Isadore Grauman did not result from disease.

It was stipulated in one of the printed conditions annexed to the certificate of membership, that the benefits of the certificate should not extend to any case in which there were no symptoms or visible sign of bodily hurt, nor to any case in which death or disability should occur in consequence of disease.

The National Benefit Association of Indianapolis v. Grauman.

We agree that in order to recover death must have occurred within the limits of the risk assumed by the contract. The condition above mentioned limited the risk to a case of death, proximately caused by physical injuries, of which there should be some visible external sign. It excluded liability in case death resulted from disease or bodily infirmity. The complaint, however, made a case within the rule above stated.

It is averred in both paragraphs that the assured sustained certain bodily injuries, which were occasioned by two separate falls, the effect and results of which are minutely described. The injuries were in part external and visible. They resulted in apoplexy and death.

The averments leave no room to doubt that death resulted from bodily injury, and not in consequence of disease. The fall and injury upon the head may have resulted in apoplexy. That the injury resulting from the fall produced a condition, aptly designated by that name, did not render it any less the cause of death. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168).

Conceding all that is said in respect to the necessity of showing as a condition precedent to a right of recovery, that death was not the result of disease, we are nevertheless constrained to hold, since the particular facts are averred, which show the physical injuries sustained by the assured, and that death resulted therefrom, that the idea is thereby effectually excluded that death could have resulted in consequence of disease. The demurrer to the complaint was properly overruled.

In the certificate of membership, it was stipulated in effect, that any statements, made by the assured in his written application, were to be considered as warranties that such statements were in all respects true. The court instructed the jury that the burden of proving untrue any of the statements or warranties thus made, was on the defendant. For the appellant it is argued that in so instructing the jury the court erred. In the recent case of *Northwestern Mut. L. Ins.*

Slauter v. Favorite, Guardian.

Co. v. Hazelett, 105 Ind. 212, we had occasion to consider the question thus made. Following the decision in the case of *John Hancock M. L. Ins. Co. v. Daly*, 65 Ind. 6, and the other authorities cited, our conclusion was that the burden of proof in like cases was, as the court instructed, on the defendant.

The appellant also complains that the court erred in refusing to give an instruction asked on its behalf. Upon consideration of the instruction refused and an examination of the concise and carefully prepared instructions given by the court of its own motion, it appears that there is nothing material to the case embraced in that refused, which was not adequately covered by those given. There was, therefore, no error in the refusal of the court to give the instruction referred to.

Finally, it is argued at much length, and with some plausibility, that the motion for a new trial should have been sustained, because the verdict was not sustained by sufficient evidence. Whatever view might be entertained as to the weight or preponderance of the evidence, it is not, as indeed it could not well be, denied that there is some evidence which strongly tends to sustain the verdict. This being the case, the conclusion reached by the court and jury at the trial can not be disturbed here.

The judgment is affirmed, with costs.

Filed May 24, 1886; petition for a rehearing overruled Sept. 16, 1886.

No. 11,662.

SLAUTER v. FAVORITE, GUARDIAN.

GUARDIAN AND WARD.—*Degree of Care Required of Guardian.*—A guardian is only required to exercise that degree of care and prudence in managing the money of his ward, which an ordinarily prudent man employs in his own affairs.

107	291
126	304
107	291
139	67
107	291
140	23
141	177
107	291
145	71
107	291
152	138
107	291
155	508

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SAME.—Investment.—Mortgage.—Liability for Loss.—Fraud.—Where a guardian acts in good faith and with reasonable diligence in taking a mortgage, believing it to be a senior lien, as security for a loan of his ward's money, he can not be held liable for a loss solely on the ground that such mortgage was made a junior one by the fraud of the mortgagor.

SAME.—Relying on Statements of Borrower.—Negligence.—Ten days before loaning money of his ward, a guardian examined the records and found the land offered as a security to be free from encumbrances. The borrower owned property worth many thousand dollars more than the amount of the loan. He was a business man of excellent credit and standing, and it was not known that he was in debt. At the time the mortgage was executed, the borrower told the guardian that the land was unencumbered, but he had in fact in the meantime mortgaged it to a third person.

Held, that the guardian was not guilty of negligence in relying upon the statement of the borrower.

SAME.—Taking Mortgage Executed by Husband Alone.—Measure of Damages.—Burden of Proof.—Where a guardian accepts a mortgage executed by the husband alone, the burden is on him to show that the husband's estate in the land is an adequate security for the money loaned; and if such fact be not shown, he will be deemed negligent in not requiring the wife to join in the execution of the mortgage, and held liable for the resulting loss, *i. e.*, the value of the wife's interest in the land.

SAME.—Final Report.—Representations.—Concealment.—Fraud.—A guardian who, in making his final settlement report on resignation of his trust, represents that an uncollected note, taken for a loan of his ward's money, is of its full face value, concealing the fact that the maker has become insolvent, is guilty of fraud.

SAME.—Taking Note in Individual Name.—The fact that a guardian has taken a note for his ward's money in his individual name, without any designation of his official character, may be considered, with other facts, in support of a finding of fraud.

SAME.—Special Finding.—Absence of Epithets.—Practice.—Where the facts specially found enable the court to pronounce the proper judgment, the absence of the epithets "fraud" and "negligence" is immaterial.

PRACTICE.—Special Finding.—When Error in Conclusion of Law not Available.—If the ultimate judgment is right and is sustained by the special finding of facts, an error in one of the conclusions of law will not justify a reversal.

From the Fountain Circuit Court.

J. McCabe, C. M. McCabe and E. F. McCabe, for appellant.
W. C. Wilson and J. H. Adams, for appellee.

Slauter v. Favorite, Guardian.

ELLIOTT, J.—The material facts contained in the special finding, stated in an abridged form, are these: The appellant was the guardian of Jennie B. and Fannie E. Hollowell, and while holding that trust lent twenty-one hundred dollars of the money of his wards to Wilson T. Moore. To secure this loan Moore executed to the appellant a promissory note and a mortgage conveying eighty acres of land, but in neither of these instruments was the appellant described as guardian, nor was the mortgage signed by Moore's wife. At the time the loan was made Moore lived thirty miles distant from the city of Attica, where the appellant resided; he was well known in "business circles, his financial standing and credit was excellent," and he had property, real and personal, of the value of twelve to fifteen thousand dollars, but he was at that time greatly in debt; this fact was, however, not known to the appellant, nor was it generally known. Ten days prior to the time the loan was made, the appellant examined the title to the land which Moore proposed to mortgage, and which he did afterwards mortgage, and found that there were no encumbrances. After the title had been examined by the appellant, Moore borrowed four thousand dollars from an insurance company, and executed a mortgage to the company to secure the loan on the land described in the mortgage executed to the appellant. The mortgage for the four thousand dollars was executed on the 1st day of October, 1873, that to the appellant on the 8th day of that month, and the four thousand dollar mortgage was recorded on the 4th day of the same month. Moore informed the appellant at the time he executed the mortgage to him, that there was no encumbrance on the land, and the former believed that the mortgage executed to him was the prior one. The land covered by the mortgage was worth twenty-four hundred dollars, and two hundred dollars of the mortgage debt was subsequently paid by Moore. On the 27th day of May, 1875, Moore became notoriously insolvent, and made an assignment for the benefit of creditors, and was openly and notoriously insolvent

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when the appellant made his final settlement as guardian and resigned his trust on the 7th day of June, 1875. When that settlement was made the note executed by Moore remained uncollected, and was by the appellant in his final report represented to the court as being secured by mortgage, and as being of the full face value. The appellant withheld from the court the information that Moore was then entirely insolvent, and that the mortgage securing the payment of the note was a second mortgage, and was not sufficient security. Upon the representation in the final report as to the value of the note and the sufficiency of the security, the report was accepted and approved by the court. The mortgage was not a sufficient security for the loan, and the note was not worth its face. At the time the report was filed the appellant had no actual knowledge that the mortgage executed to him was junior to that executed on the 1st day of October, 1873, but after the report was filed suit was brought to foreclose that mortgage, to which he was made a party. No other representations were made than those contained in the final report. The court stated the following conclusions of law:

"1st. That the defendant was guilty of negligence in loaning the twenty-one hundred dollars of his wards' money to Wilson T. Moore, and in failing to properly secure said loan.

"2d. That the defendant was guilty of fraud in representing to the court that the note taken by him from Wilson T. Moore was secured by mortgage on real estate, and failing to state the facts of the insolvency of Moore, and that the mortgage was a second mortgage."

The case as presented by the first conclusion of law is a hard one wherever the loss falls, whether upon the guardian or upon his wards, since the guardian was not guilty of any positive wrong, but acted in good faith, and his wards took no part, and, indeed, could take none, in the transaction which resulted in the loss of their money. Guardians must be held to exercise care and prudence in managing and investing the money of their wards, and lax rules upon this

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subject would lead to grave abuses and wrongs, but, on the other hand, guardians are not insurers of the safety of investments made by them, nor should they be held to an extraordinary degree of care, for to require that high degree of care would deter prudent men from undertaking the trust, and thus compel the courts to appoint incompetent or unworthy men to manage the persons and estates of infants. The interests of infants placed under guardianship would suffer quite as much from a rule too exacting and strict as from one too lax and liberal. The degree of care and prudence required of the guardian ought not to be higher than such as an ordinarily prudent man employs in his own affairs, and this is the degree which the law requires. An American writer says: "So far as the guardian acts within the scope of his powers he is bound only to the observance of fidelity, and such diligence and prudence as men display in the ordinary affairs of life." Schouler Domestic Relations, section 348. At another place this author says, in speaking of the guardian: "And to make him liable in ordinary cases, beyond the limits of good faith and a sound discretion, would be intolerable." In *Lovell v. Minot*, 20 Pick. 116, it was held that a guardian acting in good faith was liable only in the case of a failure to exercise a sound discretion, and Chief Justice SHAW, by whom the opinion of the court was delivered, said: "The rule was well laid down in *Harvard College v. Amory*, 9 Pick. 461, that 'all that can be required in such cases is, that the trustee shall conduct himself faithfully, and exercise a sound discretion;' and by this rule the court are of opinion, that the present case must be governed." The general subject received careful consideration in *Jones' Appeal*, 8 Watts & Serg. 143 (42 Am. Dec. 282), where it was said by GIBSON, C. J., that, "Where the property is small, plain country farmers unversed in legal niceties are generally prevailed on by the friends to take charge of it, and from these justice requires no more than a reasonable degree of vigilance ex-

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exercised in good faith. It certainly does not require that the office of a guardian should be a trap for the simple."

The quotations we have made reflect the views of the courts upon this subject, and among other courts that share these views is our own. *Marquess v. La Baw*, 82 Ind. 550, see p. 553; *Sanders v. State, ex rel.*, 49 Ind. 228; *Norwood v. Harness*, 98 Ind. 134 (49 Am. R. 739).

Where a guardian accepts a mortgage as security for a loan of his ward's money, it should, in all ordinary cases, be a first mortgage, for the guardian has no right to incur the peril caused by the existence of a prior mortgage, for it might readily happen that the estate of the ward could not furnish money to pay off the first mortgage, and in that event the security afforded by the second mortgage would be valueless. Second mortgages are precarious securities and guardians should not take them. *Shuey v. Latta*, 90 Ind. 136. But in this instance the guardian intended to take a first mortgage; it was for such a mortgage that he contracted, and such it was that he believed he was getting, nor did he actually know that it was not a first mortgage until after he had resigned his trust.

If the guardian acted in good faith and with reasonable diligence in taking the mortgage, he can not be held liable solely on the ground that the mortgage which he believed to be the senior one was made the junior one by the fraud of Moore, the mortgagor. The utmost care and prudence will not always guard against loss. In every loan that is negotiated there is some risk that no ordinary prudence or sagacity can avoid; in almost every case something must be trusted to the borrower's honesty. There are few cases, indeed, where one who lends money upon real estate security is not compelled to rely, to some extent, upon the statements of the mortgagor that there are no unrecorded mortgages, and the question upon this particular phase of the case narrows to this, was the guardian negligent in relying upon the statements of the mortgagor that there were no encumbrances on

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the land? In our opinion he was not. The safer course for the guardian is to rely upon the record, and not upon the statements of the borrower, but the most prudent business men often act upon the representations of the borrower, and in many cases must necessarily do so. A guardian is bound to do no more than a reasonably prudent man would do under like circumstances. There are cases, therefore, where the guardian may trust to the statements of the borrower, and this is one of them. Here the guardian had examined the record within ten days; the result of the examination corroborated the statements of Moore; the property owned by the latter was valued at fifteen thousand dollars; he was a business man of excellent credit and standing, and it was not known that he was in debt, so that the case presented is not that of carelessly trusting a man without credit, property or standing, for here the borrower was worth more than five times the amount of the sum lent him, and was an active business man of excellent reputation.

Negotiations for loans are often in progress several days before they are concluded, and the lender is not always to be regarded as negligent unless he keeps watch upon the records to the last day or the last hour on which the negotiations are concluded. There may be cases where such great vigilance is required, but there are cases where it is not exacted, and this case belongs to the latter class. There are adjudged cases going much further than we are required to do here, among them *Ferguson v. Lowery*, 54 Ala. 510 (25 Am. R. 718), *Parsley v. Martin*, 77 Va. 376 (46 Am. R. 733), *Estate of Ada Worrell*, 14 Phila. R. 311, *Neff's Appeal*, 57 Pa. St. 91.

The safest and most prudent course for a guardian to pursue, in making an investment of his ward's money in real estate security, is to require the wife of the mortgagor to join in executing the mortgage, and it is hazardous for him to pursue any other course; but there may be cases where it would not be negligence for the guardian to accept a mortgage executed by the husband alone. It may often be that the interest of

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the husband, exclusive of that of the wife, is amply sufficient to secure the investment, and in such a case it could not be justly held that the guardian was negligent in not requiring the wife to join in the execution of the mortgage. Where, however, the guardian accepts a mortgage executed by the husband alone, he must show that the husband's estate in the land was an adequate security for the money loaned. As the burden was on the guardian to show that fact affirmatively, and as the special finding does not show that the husband's interest was sufficient to secure the loan, nor show that the guardian made reasonable and diligent enquiry on that subject, we are of the opinion that the conclusion that he was negligent is correct. Although he was negligent in not securing the wife's signature to the mortgage, still, he ought not to be held liable beyond the extent of the loss resulting from that negligence, and the extent of that loss could not be more, at the utmost, than a sum equal to one-third of the value of the land. This is the only loss that could legitimately result from his negligence in failing to secure the wife's signature to the mortgage, and his liability should not be greater than the injury. We are inclined to the opinion that the first conclusion of law is broader than the facts warrant.

The second conclusion of law presents a question not entirely free from difficulty, but our opinion is that there is no error in it. A guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith. He must not conceal any material fact, nor untruthfully represent any matter to the court. 2 Pomeroy Eq. 902; *Kelaher v. McCahill*, 26 Hun, 148; *Klemp v. Winter*, 23 Kan. 699; *Favorite v. Slauter*, 79 Ind. 562; *Asher v. State, ex rel.*, 88 Ind. 215.

In *Jennings v. Kee*, 5 Ind. 257, the court said: "In all cases of delinquency and neglect, the courts will presume in favor of the ward and against the guardian, as strongly as the facts

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will warrant." The special finding shows that the guardian represented the note to be of its full face value, and withheld from the court the information that Moore had become insolvent, and that the mortgage executed by him was a second one. It may possibly be that the fact that the guardian believed his mortgage to be the senior one, and had no actual notice of the execution of the four thousand dollar mortgage, will free his failure to communicate information to the court upon that point from the stain of fraud; but, however that may be, he was guilty of fraud in concealing the fact that the maker of the note had become insolvent, as well as in representing that the note was of full face value. It will not avail a guardian who makes a positive representation, that he did not know that it was untrue, for, even in ordinary cases where a man makes a representation for the purpose of inducing action upon the part of another, he may be guilty of fraud although he does not know that his representation is untrue. *Frenzel v. Miller*, 37 Ind. 1 (10 Am. R. 62); *Bethell v. Bethell*, 92 Ind. 318, see p. 327; *Roller v. Blair*, 96 Ind. 203; *West v. Wright*, 98 Ind. 335. But in cases such as the present, a duty rests upon the guardian to make no statement that he does not know to be true, and to conceal nothing materially affecting his trust, of which he has knowledge. The necessity for a strong and stern application of the rule to cases like this is obvious, for the court must act upon the statements of the guardian, and there is no adverse party to challenge their truth. If the statements are not true, the order of the court rests on the wrong of the party who made it, and he can take no advantage of his own wrong.

There is another fact appearing in the special findings which exerts an important influence upon the case; the guardian took the note payable to himself without any designation of his official character, and this fact, when considered in connection with the other facts, stated in the special finding, is sufficient to sustain the second conclusion of law stated by

the trial court. There are, indeed, authorities that go so far as to hold that if a guardian takes a note payable to himself, he can not show that it was taken as an investment of his ward's money, and in case the maker becomes insolvent, the guardian must bear the loss. *Knowlton v. Bradley*, 17 N. H. 458 (43 Am. Dec. 609, and note). But we need not go so far in this case, for we need do no more than consider the fact under immediate mention in connection with the other facts stated in the special finding.

The second conclusion of law is the controlling one, and upon it the judgment below securely rests, and there would be no cause for reversal even if the first conclusion of law should be considered erroneous. If the ultimate judgment deals justly with the parties, gives to each his legal rights and is sustained by the facts appearing in the special finding an error in one of the conclusions of law will not justify a reversal. Our statute says that no judgment shall be reversed "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." *Krug v. Davis*, 101 Ind. 75; *Platter v. Board, etc.*, 103 Ind. 360, sec p. 385. The second conclusion of law is warranted by the facts and fully sustains the judgment setting aside the appellant's final report. That judgment does not, of course, settle or adjust all questions between the parties, but does adjudge that the final report should not stand.

The special finding states facts and not evidence, and in this respect is free from fault. The absence of the epithets "negligence" and "fraud" does not impair the force of the facts stated by the court. The law will infer the proper conclusion from the facts stated. It is possible that there may be cases where it is necessary to expressly characterize an act as fraudulent or as negligent, but it is not necessary in such a case as this, for here the facts of themselves enable the court to pronounce the law and declare the legal consequences that result from the facts. *Pittsburgh, etc., R. W. Co. v. Spencer*,

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98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Conner v. Citizens Street R. W. Co.*, 105 Ind. 62.

Judgment affirmed.

Filed Feb. 10, 1886; petition for a rehearing overruled Sept. 24, 1886.

.No. 12,247.

THE INDIANA OOLITIC LIMESTONE COMPANY v. THE
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY.

RAILROAD.—*Proceedings to Appropriate.—Collateral Attack.—Presumption.—*

In a collateral attack upon the validity of proceedings by a railroad company to appropriate land for its use, by a person who was a party thereto, every reasonable presumption will be indulged in favor of the regularity of such proceedings, in the absence of any showing to the contrary.

SAME.—*Award of Damages.—Remedy of Aggrieved Land-Owner.—Action to Recover Real Estate.—*A party aggrieved by an award of damages made by the appraisers in an appropriation proceeding instituted under section 3907, R. S. 1881, may have the award reviewed by the court in which such proceedings are had, on written exceptions filed within ten days after the filing of such award. This is the only remedy provided by the statute, and if it be not pursued, the land-owner can not afterwards maintain an action to recover the land appropriated.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, C. R. Worrall and W. E. Hendricks, for appellant.

G. W. Friedley and E. K. Millen, for appellee.

Howk, C. J.—This was a suit by the appellant against the appellee, in a complaint of two paragraphs. The objects of the suit were to recover the possession of a certain strip of land in Monroe county, which the appellee, as alleged, had attempted to appropriate for the purpose of constructing

107	301
121	458
107	301
148	608

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thereon a switch or side-track leading out from the main line of its railway, over and across appellant's land, to the adjacent quarry and works of the Terre Haute Stone Works, and also \$1,000 damages for the detention of such strip of land; and to perpetually enjoin the appellee from setting up any claim of title to or interest in such strip of land, and from entering upon the same or committing any trespass thereon; and to remove any cloud that might have been cast upon appellant's title to the land by appellee's attempted appropriation proceedings. To appellant's complaint the appellee answered specially, setting out at length all its proceedings and the orders of the court, in relation to its appropriation of the strip of land, mentioned in the complaint. The appellant demurred to appellee's answer, upon the ground that it did not state facts sufficient to constitute a defence to the action; and this demurrer was carried back and sustained by the court to appellant's complaint, and each paragraph thereof. Appellant refusing to amend or plead further, judgment was rendered that it take nothing by its suit, and that appellee recover its costs.

The first error complained of here by the appellant is the sustaining of its demurrer to its own complaint.

In its complaint, the appellant alleged that it was a corporation duly organized, on and before the 4th day of June, 1884, under the laws of this State; that on and since the day last named, the appellee was and has been a duly organized corporation under the laws of this State, and was and has been the owner and operator of a line of railroad, passing through Monroe county; that, on such day, appellant was the owner in fee simple and in the possession of the west half of the southeast quarter of section 17, in township 10, range 2 west, in such county, lying near the line of appellee's railroad, and near the town of Stinesville, a station on such railroad; that appellee, at such town of Stinesville, and for five miles on each side thereof, was the owner of and occupied its right of way, sixty feet wide, which was all that was neces-

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sary for its railroad, including its side-tracks and water-stations, for the use thereof; and that appellant's land above described was underlaid with a ledge of valuable limestone, suitable for quarrying purposes and chiefly valuable therefor.

And appellant further averred that a corporation, known as the "Terre Haute Stone Works Company," was the owner of a tract of land on which was situated a stone-quarry, which quarry was a long way, to wit, thirty-five hundred feet from the line of appellee's railroad, and was at no place nearer to such railroad than the distance of twenty-five hundred feet; that, on such day, the Terre Haute Stone Works Company desiring to connect its quarry with appellee's railroad by means of a switch or turn-out, over which it might haul its stone, procured the appellee to begin proceedings to appropriate a strip of land, sixty-six feet wide, from the line of its track, near such town of Stinesville, to the quarry of of such Terre Haute Stone Works Company; that the center line of such strip of land, so to be appropriated, ran over and across appellant's said land; that, in pursuance of such intention to appropriate such strip of land, appellee's attorneys, on such 4th day of June, 1884, filed in the clerk's office of the court below its pretended instrument of appropriation; that thereafter, on June 25th, 1884, the judge of such court at chambers, in vacation, upon the application of appellee's attorneys, appointed by warrant Aquilla W. Rogers, George W. Finley and Freeborn G. Pauley to appraise the damages which the owner of the land might sustain, over which such switch or turn-out passed, by reason of such appropriation; that afterwards, on July 14th, 1884, the appraisers aforesaid returned their appraisement to the clerk of such court showing, among other things, that appellant would be damaged in the sum of \$400, which sum the Terre Haute Stone Works Company, by the appellee, on the 1st day of ———, 1884, deposited in the clerk's office of such court, for the appellant's use and benefit; and that such sum of money was still

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in the hands of such clerk, no part thereof having ever been taken or accepted by appellant.

And appellant further said, it was informed and believed that such turn-out or switch would pass over its land in a diagonal course, for the distance of one thousand four hundred and seventy-eight feet, and take two and one-half acres thereof; that on account of the hilly and uneven surface of such land, such turn-out or switch when completed would necessarily consist of fills and cuts, of heights and depths varying from ten to twenty feet, and passing through appellant's valuable limestone; that such switch or turn-out would cut appellant's land into two triangular tracts; that by reason of the turn-out or switch being so constructed, and the land being so divided, appellant would suffer irreparable injury; that, by reason of appellee's owning and controlling a strip of land, sixty-six feet wide, through, over and across appellant's land, intended for a quarry, for one thousand four hundred and seventy-eight feet, a large portion of such quarry would be rendered almost valueless; that continuously since such pretended appropriation, on June 4th, 1884, until January 9th, 1885, appellant had been in the quiet, peaceable and undisturbed possession of all its land, neither appellee nor the Terre Haute Stone Works Company occupying or exercising any acts of ownership over it; that, on January 9th, 1885, the Terre Haute Stone Works Company, by its agents and employees, fifteen in number, pretending to be appellee's employees, by virtue of such pretended act of appropriation and in appellee's name, unlawfully and without right, and without appellant's consent, took possession of such land, threw down the fences and began the construction of such switch or turn-out, and had since unlawfully kept the possession of the land from appellant, who was entitled to the immediate possession thereof.

Appellant then averred that such pretended act of appropriation of such strip of land, over and across its real estate

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hereinbefore described, was illegal, null and void for a number of reasons, which are set forth at great length.

In the view we shall take of appellant's case, in the light of appellee's answer, the averments of which were admitted to be true by appellant's demurrer thereto, it is unnecessary for us to give the substance even of its numerous reasons for claiming that the appropriation proceedings were illegal, null and void. Some of such reasons, if they had been presented at the proper time and in the proper manner, might have been available to the appellant for some relief; but, for the most part, all such reasons are overthrown and rendered nugatory and of no avail by the averments of appellee's answer, which, as we have said, are conceded to be true, as the case is here presented; for these averments show that, in the appropriation proceedings of which appellant complains, the appellee strictly followed the statute and complied with its requirements.

It is apparent from appellant's complaint that the appellee instituted and prosecuted its proceedings for the appropriation of so much of appellant's land as it needed for the construction of its switch or turn-out, described in such complaint, under the provisions of section 3907, R. S. 1881, in force since May 6th, 1853. In its complaint appellant has sought to make a collateral attack upon the validity of appellee's appropriation proceedings. As in other cases of collateral attack, of course, in the absence of averment or showing to the contrary, every reasonable presumption must be indulged in the case in hand in favor of the regularity, legality and validity of such appropriation proceedings as against the appellant, who was a party to such proceedings. *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, 97 Ind. 146; *Rogers v. Beauchamp*, 102 Ind. 33; *Exchange Bank v. Ault*, 102 Ind. 322; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486.

Thus, in the case under consideration, appellant's complaint shows that on June 4th, 1884, the appellee deposited

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in the clerk's office of the proper court its instrument of appropriation of a strip of appellant's land, for its switch, side-track or turn-out. But the complaint fails to show whether or not appellee delivered to appellant a copy of such instrument of appropriation, as required by section 3907, *supra*. In such case we presume in aid of the appropriation proceedings, and in favor of their regularity, legality and validity, that appellee did deliver to appellant, as required by the statute, a copy of such instrument of appropriation. So, the complaint shows that the judge of the court in vacation appointed by warrant three named persons to appraise appellant's damages by reason of appellee's act of appropriation; but it fails to show whether such appraisers were, or were not, disinterested freeholders of the proper county, or were, or were not, duly sworn, as required by the statute. In such case, also, we conclusively presume in aid of the appropriation proceedings, that the persons appointed were competent appraisers, under the statute, and were duly sworn as such, as required thereby.

Appellant states in its complaint that, on July 14th, 1884, the appraisers appointed for that purpose returned to the clerk of such court their award of its damages by reason of such appropriation. The statute provides that such an award may be reviewed by the court in which the appropriation proceedings were had, "on written exceptions filed by either party in the clerk's office, within ten days after the filing of such award." Section 3907, *supra*. This remedy by appeal is the only remedy provided by the statute for the party aggrieved by such award; and it must be taken within the time and in the manner prescribed by the statute. Appellant filed no exceptions to the award of its damages, and took no appeal therefrom to the proper court, so far as the record shows. "within ten days after the filing of such award," nor at any other time. The damages awarded to the appellant on account of appellee's appropriation of its strip of land were promptly paid to the clerk of such court; and thereupon and there-

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after, by the express terms of the statute, such strip of land belonged to the appellee, to be used for the purposes specified in its act of appropriation. Six months afterwards appellant commenced this action to recover such strip of land, and to enjoin appellee from constructing thereon its switch, side-track or turn-out.

For reasons already given, we are of opinion that the court did not err in sustaining the demurrer to appellant's complaint.

The judgment is affirmed, with costs.

ELLIOTT, J., took no part in the decision of this cause.

Filed June 1, 1886; petition for a rehearing overruled Sept. 24, 1886.

107	307
127	304
107	307
131	31
131	323

No. 12,572.

JUNE ET AL. v. PAYNE ET AL.

APPEAL.—*Stay of Proceedings.*—An appeal prayed for in term time, and perfected within the time given by the court, suspends all further proceedings under the judgment appealed from; but an appeal in vacation, and without bond, does not so operate.

REPLEVIN.—*Judgment for Return of Property.*—*Bond.*—Where, in replevin proceedings, the plaintiff is awarded a return of the property, it must be returned, without demand, in as good condition as when received by the defendant under the bond, and within a reasonable time after the order is made.

SAME.—*Appeal.*—*Delay in Returning Property.*—*Action on Bond.*—*Mitigation of Damages.*—Where, after an appeal to the Supreme Court by the defendant to replevin proceedings, against whom a return of the property is awarded, there is an implied understanding that no measures to enforce the penalty of the bond for a return will be taken until the appeal is disposed of, and no such steps are in fact taken until a few days before the final decision in the case, when the property is returned in good condition, the delay is not unreasonable, and in an action on the bond the return may be considered by the jury in mitigation of damages.

PRACTICE.—*Trial Without Issue.*—*Judgment by Confession.*—Where, without

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objection, a party alleging affirmative matter in his pleading goes to trial without requiring an issue to be formed upon such pleading, he can not afterwards ask judgment in his favor as by confession.

From the Montgomery Circuit Court.

P. S. Kennedy, T. H. Ristine, S. C. Kennedy and H. H. Ristine, for appellants.

J. Wright, J. M. Seller and A. D. Thomas, for appellees.

NIBLACK, J.—The facts upon which this case rests may be briefly stated as follows: In July, 1881, David June, Erastus B. French and Robert Brayton, the plaintiffs below and appellants here, commenced an action against John F. Payne, Benjamin M. Payne and John P. Payne in the court below, to recover the possession of a portable engine made by Y. D. June & Co., of Fremont, Ohio; and to enable the defendants in that action to retain the possession of the engine pending the action, the said Benjamin M. Payne, as principal, and Thompson Davis, Martin Sarvies, David Vancleve and Asbury T. Hicks, as his sureties, afterwards, on the 20th day of July, 1881, executed a bond to the plaintiffs in the penal sum of \$1,000, conditioned that if the said obligors should safely keep such engine, and in no wise injure the same, and should deliver said engine to the plaintiffs, or to the sheriff of Montgomery county, in the event that judgment should be rendered for the return thereof, such bond should be void. On the 27th day of May, 1882, the plaintiffs in that action recovered a judgment against the defendants for the possession of the engine and for the sum of \$600 in case a return of the engine could not be had. The defendants at the time prayed an appeal to the Supreme Court and thirty days' time was given within which they might file an appeal bond in the penal sum of \$1,000, to the approval of the clerk. Such a bond was filed within the time limited, and approved by the clerk, but a transcript of the proceedings appealed from was not filed in the Supreme Court until the 3d day of May, 1883. Pending the appeal in this court, no

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supersedeas was issued and no proceedings were taken for the enforcement of the judgment appealed from, both parties seemingly awaiting a final decision upon the appeal before taking further action concerning the matters in controversy. On the 1st day of November, 1883, the judgment of the court below was affirmed. See *Payne v. June*, 92 Ind. 252. Some time near the last day of that month, one of the defendants to the judgment thus affirmed met one of the plaintiffs' attorneys on the street in the city of Crawfordsville, and, informing him that he was ready to make return of the engine, inquired as to whom he should deliver it; whether to him, the attorney, or to the plaintiffs at Fremont, Ohio. To this inquiry the attorney replied that he did not want the engine; that he preferred to have the money, the engine being at that time five or six miles away in the country. A few days later, that is to say, on the 5th day of December, 1883, the plaintiffs, June and others, commenced this action against Benjamin M. Payne, and his sureties, upon the bond, executed by them as herein above stated, for their alleged failure to make return of the engine in accordance with the stipulations of that bond. On the 10th day of the same month, the defendants in this action brought the engine to the city of Crawfordsville and delivered it to the sheriff of Montgomery county.

The defendants thereafter answered in four paragraphs:

First. That an appeal had been prayed in term time from the judgment for the recovery of the engine; that the appeal had been perfected by the execution of a proper appeal bond and the filing of a transcript in the Supreme Court, and that such appeal was pending and undetermined when this action was commenced.

Second. That the judgment for the recovery of the engine had been appealed from as above set forth, and that while such appeal was still pending they had returned the engine described in the bond to the sheriff of Montgomery county.

Third. That an appeal had been taken, as above stated, and

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that immediately after the judgment appealed from was affirmed, they, the defendants, tendered back the engine to the attorneys for the plaintiffs, who refused to receive the same, whereupon they delivered said engine to the sheriff of Montgomery county.

Fourth. That an appeal had been prayed and taken as stated in the first paragraph herein, but without averring that such appeal was still pending and undisposed of.

A demurrer was sustained to the second paragraph, and overruled as to the remaining paragraphs of the answer. Issue, trial by jury and verdict for the plaintiffs, assessing their damages at \$35.20.

Answers to special interrogatories respectively submitted to the jury found the facts to be substantially as herein above stated, and showed that the amount of the damages assessed by the general verdict was for costs due upon the original judgment. The plaintiffs thereupon moved for judgment in their favor upon the answers to the special interrogatories for the sum of \$600, the adjudged value of the engine, with interest, including also the amount of costs due upon the original judgment, but that motion, as well as a motion for a new trial, was overruled, and judgment was rendered for the amount of the damages assessed by the general verdict.

The plaintiffs, appealing, assign error upon the overruling of their demurrer to the first, third and fourth paragraphs of the answer, upon the overruling of their motion for judgment upon the answers to special interrogatories, and upon the refusal of the circuit court to grant them a new trial.

We see no objection to the sufficiency of the first and third paragraphs of the answer. An appeal prayed for in term time, and perfected within the time limited by the court, suspends all further proceedings under the judgment appealed from, and a return of the engine to the sheriff was a performance of the principal condition of the bond. Wells Replevin, section 426.

As to the sufficiency of the fourth paragraph of the an-

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swer, we need not inquire, since, upon the whole case, we regard the question of its sufficiency as of no practical importance at the present hearing. The evidence, supplemented by the answers to the special interrogatories, showed affirmatively that the plaintiffs were not injured by the overruling of the demurrer to that paragraph. It was thus made to appear that no such an appeal as that relied upon in defence by the first and fourth paragraphs of the answer, was in fact taken, and that the appeal which was afterwards consummated was an appeal in vacation without bond, and consequently without any stay of proceedings. *Burk v. Howard*, 15 Ind. 219.

The important, and indeed controlling, questions at the trial were: *First*. Were the defendants guilty of unreasonable delay in offering to return or in returning the engine? *Secondly*. Could the return of the engine after the commencement of this action be taken into consideration in mitigation of the damages?

It is true that, in cases of this kind, the property must be returned in as good order as when received under the bond, and within a reasonable time after a return has been awarded, and that too without demand for its return. Wells Replevin, sections 419 to 423, both inclusive. But what is a reasonable time must, to a very great extent, depend upon the circumstances attending each particular case.

In the case before us, there was evidence tending to show what seemed to be an implied understanding that no measures would be taken to enforce the penalty of the bond, or to disturb the *statu quo*, until there was a final decision of this court upon the appeal taken in the replevin suit. There was also evidence tending to prove that from the first the plaintiffs did not desire a return of the engine, but preferred to abide the course of events in this court, and, if practicable, to eventually recover the value of the engine in money. This was in part well illustrated by the refusal of one of their attorneys to give any directions concerning the return

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of the engine, only a few days before this action was commenced. Then a petition for a rehearing which had been filed in the cause was not overruled until the 12th day of December, 1883, seven days after the institution of this action and two days after the engine was returned to the sheriff. There was evidence, therefore, which justified the jury in coming to the apparent conclusion that there had been, under all the circumstances, no unreasonable delay in returning the engine. Having reached this conclusion, the jury were further justified in taking the return of the engine into consideration in mitigation of the damages. *Schrader v. Wolfen*, 21 Ind. 238; *Story v. O'Dea*, 23 Ind. 326; *Wells Replevin*, sections 457, 458.

There was also evidence tending to prove that the engine was in as good condition when it was returned as it was when the bond in suit was executed. We have consequently no reason for concluding that the general verdict was not substantially right upon the evidence.

The judgment is affirmed, with costs.

Filed June 3, 1886.

ON PETITION FOR A REHEARING.

NIBLACK, J.—After the verdict in this case was returned, the plaintiffs, in addition to their motion for a judgment for a larger sum than was assessed in their behalf by the jury upon the answers to special interrogatories, moved the court for judgment in their favor for the sum of \$600, and the costs due on the original judgment, upon the pleadings, on the ground that, as no general denial was filed, all the facts necessary to entitle them to such a judgment were admitted at the trial, and that motion was also overruled. A rehearing is prayed for in this case for the alleged reason that the circuit court erred in overruling that motion, and that we omitted to rule upon that question at the former hearing.

But the answers in this case, whether well pleaded or not,

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presented issues which had to be tried and determined, and hence it can not be said that the cause was tried without an issue. As to what facts were admitted by the issues, as they were formed, were only questions of evidence at the trial. Besides the cause was apparently tried upon the theory that every material averment of the complaint was in issue. As illustrative of this theory of the trial, the first interrogatory submitted to the jury at the request of the plaintiffs was: "Did the defendants in this suit execute the bond sued on in this case as alleged in the plaintiffs' complaint?" Other interrogatories were submitted, upon the motion of the plaintiffs, inconsistent with the idea that no issue had been formed upon the complaint. Under such circumstances the plaintiffs could not be heard to complain, after the trial was concluded, that the cause had been tried without an issue, or that the material averments of the complaint stood as confessed at the trial.

Where, without objection, a party alleging affirmative matter in his pleading goes to trial without requiring an issue to be formed upon such pleading, he can not afterwards ask judgment in his favor as by confession. *Bass v. Smith*, 61 Ind. 72; *Lewis v. Bortsfeld*, 75 Ind. 390; *Felger v. Etzell*, 75 Ind. 417; *Stribling v. Brougher*, 79 Ind. 328.

It is unnecessary to set out any more of the special interrogatories and answers of the jury, since there is nothing in any of the answers in question inconsistent with the facts as stated in the original opinion.

The petition for a rehearing is overruled.

Filed Sept. 25, 1886.

 No. 12,290.

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EQUITY.—*What One Seeking Equitable Relief Must Show.*—One who seeks equitable relief must show that he has done, or offered to do, in the premises all that equity requires of him.

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120	126
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144	24
107	313
154	400

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MARRIED WOMAN.—*Contract of Suretyship.—Husband and Wife.—Purchase by, of Undivided Interest in Real Estate.—Mortgage.—Promissory Note.*—With full knowledge of her financial resources, E. sold to a married woman a certain undivided part of real estate, receiving payment therefor in cash. At the same time he sold to her husband the remainder of such real estate, payment to be made in instalments, and executed a conveyance of the whole to the wife. The husband executed notes for the interest purchased by him, and, at E.'s request, his wife signed them as surety. To secure the payment of the notes a mortgage was executed on the entire property by both husband and wife.

Held, that under section 5119, R. S. 1881, both the notes and the mortgage are void as to the wife, and that her interest in the real estate can not be affected thereby, but it is otherwise as to the husband's interest.

From the Decatur Circuit Court.

J. S. Scobey, for appellants.

J. K. Ewing and C. Ewing, for appellee.

Howk, J.—In this case, appellee Ewing sued the appellants Abigail C. and William L. Jones, husband and wife, in a complaint of one paragraph. It was alleged that the appellants, on the 24th day of October, 1881, by their nine promissory notes, became indebted to appellee in the aggregate sum of \$1,000; that at that date, to secure the payment of such notes, the appellants executed a mortgage upon the north half of lot No. 103, in block 14, in the original plat of the town (now city) of Greensburgh, in Decatur county, which mortgage was on the same day duly recorded in the recorder's office of such county; that the first one of such notes to mature, for \$150, had been fully paid, and the second and third notes to mature were then past due and, with the residue of such notes, were wholly unpaid; that the notes and mortgage were given for the unpaid balance of the purchase-money of the above described real estate; and that the mortgaged premises could not be sold in parcels without injury to the interests of the parties. Wherefore appellee demanded a personal judgment against the appellants for \$1,200, and a decree of foreclosure against the mortgaged

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property, all without relief, etc., with costs and all other proper relief.

Appellants answered in four special or affirmative paragraphs, to the second of which appellee's demurrer, for the want of sufficient facts, was sustained by the court. He replied by a general denial to the first, third and fourth paragraphs of answer. The issues joined were tried by the court, and a finding was made for appellee against the appellants for the amount due, and to become due, upon their promissory notes, and a personal judgment was rendered against the appellants, and in appellee's favor, for the amount found due with costs, and a decree was rendered for the sale of the mortgaged property and for the application of the proceeds of such sale, etc. Appellants' motion for a new trial having been overruled, and the separate motion of Abigail C. Jones for a new trial having been also overruled, they have appealed from such judgment and decree to this court.

Errors have been assigned here by the appellants, which call in question (1) the overruling of their several motions for a new trial, and (2) the sustaining of appellee's demurrer to the second paragraph of the answer of appellant Abigail C. Jones.

In the natural order, the questions presented by the alleged error of the court, in sustaining appellee's demurrer to the second paragraph of answer, must be first considered and decided. In such second paragraph of her separate answer, appellant Abigail C. Jones alleged that, on and prior to the 24th day of October, 1881, she being then the wife of her co-appellant, William L. Jones, then had and possessed in her own right and as her individual and separate estate, in cash, the sum of \$700, which sum of money was her entire separate estate; that she was then and there desirous to invest the same in real estate, of a value which she could purchase and fully pay for with that sum of money; that at that time her husband, William L. Jones, with her and their children, resided in the city of Greensburgh, in Decatur

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county; that at that time her said husband was a man of but small means, consisting of his household goods, of a value not exceeding \$100, and had no other estate; that at such time William L. Jones was a common laborer, in the service of the Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company, earning wages at about \$30 per month; that at such time appellee was and had been since the agent of such railroad company, at such city of Greensburgh, and then and there knew of the possession of such sum of money by appellant Abigail, and of her desire to invest the same as aforesaid; that appellee being then and there the owner of the real estate, described in the mortgage in suit, proposed to sell the same to appellants for the sum of \$1,700, appellant Abigail to invest therein such sum of \$700, and for the remaining \$1,000 he would take notes, in the sums and at the times of maturity mentioned in such mortgage, and at the same time, and as an inducement to such sale, he promised and agreed to furnish said William L. Jones labor such as he was then performing for such railroad company, continuously for such term of nine years, and thus enable him to pay off such purchase-money from the proceeds of his own labor; that at such time appellee well knew that appellant Abigail had no means or estate beyond such sum of \$700, and that said William L. Jones had no estate other than as stated herein as aforesaid; that relying upon appellee's promises and assurances that he could and would furnish William L. Jones the labor and means, as hereinbefore stated, and enable him to pay such sum of \$1,000 on such real estate, the appellants then and there agreed with appellee to purchase the same, that is, appellant Abigail being the purchaser thereof to the extent and in the sum of \$700, and said William L. Jones in such sum of \$1,000; that in pursuance thereof, appellee made to appellant Abigail C. Jones a conveyance of such real estate, on such 24th day of October, 1881, and put appellants in possession thereof, which possession they had since held; that appellant Abigail then paid

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appellee such sum of \$700, and said William L. Jones, as principal, and said Abigail C. Jones, as his surety, executed to appellee the notes and mortgage described in his complaint.

Appellant Abigail further said that appellee, in pursuance of his agreement, continued to furnish said William L. Jones with labor as aforesaid, for eighteen months then next following, and out of the proceeds of such labor he paid appellee the first note to mature for \$150, with interest, and the interest on the other notes for two years, amounting to \$102; that appellee failed and refused to further employ said William L. Jones, or to furnish him any labor or employment whatever, although often and specially thereunto requested, he, the said William L., being then and there, and continuously thereafter, able, willing and anxious to do and perform the same, and thus be enabled to pay off and discharge such notes and mortgage; that such work and labor having been refused by appellee to said William L. Jones, he had been unable to obtain other remunerative employment and to earn any money to pay on such notes, since his discharge by appellee; that had the appellee continued said William L. Jones in such labor, he could and would have had all the money due on such notes and mortgage paid off and discharged; and that said William L. Jones was still ready and willing to pay such notes and mortgage to appellee, if the latter on his part would furnish the former the labor, and thus the ability to pay them, pursuant to the promises and assurances of appellee as hereinbefore stated.

We are of opinion that the circuit court erred in sustaining appellee's demurrer to the second paragraph of answer, the substance of which we have just given. Appellee's suit is one which has always been of equitable jurisdiction. If the averred facts in such paragraph of answer are true, and, as the case is now presented here, their truth is admitted by appellee, it is certain, we think, that he can have no standing in a court of equity to enforce the notes and mortgage in

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suit against the appellant Abigail C. Jones, to the extent of the interest which she bought and paid for in cash, in the mortgaged real estate. It is an elementary rule in all equitable suits, often recognized and followed in the decisions of this court, that he who seeks equitable relief must show that he has done, or offered to do, in the premises, all that equity requires of him. *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. DuHadway*, 97 Ind. 565; *Rowe v. Peabody*, 102 Ind. 198; *Russell v. Cleary*, 105 Ind. 502.

Fairly construed, the facts averred by Abigail C. Jones, in such second paragraph of answer, and admitted to be true by appellee's demurrer, show very clearly, as it seems to us, that the appellee sold to her, Abigail C. Jones, with full knowledge of her estate and financial resources, the undivided seven-seventeenths part of the mortgaged real estate, for the sum of \$700, cash in hand, and knowingly received from her all the estate she had, in payment therefor, to wit, such sum of \$700 in money; that at the same time the appellee sold to William L. Jones, the husband of Abigail C. Jones, the remaining ten-seventeenths part of such mortgaged real estate for the sum of \$1,000 on time, payable in nine annual instalments; that at the same time appellee executed a conveyance of the whole of such real estate to Abigail C. Jones; that at the same time William L. Jones executed to appellee the notes, described in the complaint herein, for the interest purchased by him in the mortgaged real estate, which notes were then executed, also, at appellee's request, by Abigail C. Jones as the surety of her husband; that at the same time the mortgage in suit was executed to appellee by both the appellants on the entire real estate purchased by them respectively as aforesaid, to secure the payment of the notes described therein also executed by them respectively; and that the notes and mortgage in suit were so executed as aforesaid by the appellants on the 24th day of October, 1881.

These facts being true, and the appellee admits them to be true as the case is presented by his demurrer to such second

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paragraph of answer, it is very clear, we think, that the notes described in appellee's complaint are absolutely void as to Abigail C. Jones, and no personal judgment can be rendered against her thereon; and that the mortgage in suit, in so far as it covers or affects the interest, purchased and paid for by her as aforesaid, in the mortgaged real estate, is also void as to her, and can not be foreclosed or enforced against her interest in such real estate, so purchased and paid for as aforesaid. When such notes and mortgage were executed as aforesaid, section 5119, R. S. 1881, was, as it still is, in full force, as a part of the law of this State. This section provides, in plain and unmistakable terms, that a married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner, and that any such contract, as to her, shall be void. These statutory provisions are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and positively declare that any such contract, as to her, shall be void. So the law is written, and so in our decisions it has been uniformly interpreted and construed. *Allen v. Davis*, 99 Ind. 216; *Dodge v. Kinzy*, 101 Ind. 102; *Allen v. Davis*, 101 Ind. 187; *Brown v. Will*, 103 Ind. 71; *Engler v. Ackcr*, 106 Ind. 223.

Of course, as to the interest purchased by William L. Jones, in the mortgaged real estate, and for which the notes in suit were executed by him, as principal, and by his wife, Abigail C. Jones, as his surety, the mortgage sued upon is a valid security, and binding on both the appellants, and, to the extent of that interest, but no farther, may be foreclosed by a court of equity. But if, upon the final hearing of this cause, the facts averred in such second paragraph of answer should be sustained by sufficient evidence, it would be manifestly illegal to render a personal judgment against Abigail C. Jones upon the notes in suit, and manifestly unjust and inequitable to decree the foreclosure of such mortgage upon and the sale of the interest, purchased and paid for by her as afore-

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said, in the mortgaged real estate. We conclude, therefore, that appellee's demurrer to such second paragraph of answer ought to have been overruled.

This conclusion renders it unnecessary for us to consider now any question arising under the alleged error of the court in overruling the motions for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Filed May 13, 1886; petition for a rehearing overruled Sept. 25, 1886.

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G. W. Friedley, W. H. Russell, E. K. Millen and W. Irvin,
for appellant.

J. R. East, W. H. East, J. W. Buskirk and H. C. Duncan,
for appellee.

ELLIOTT, J.—The appellee's complaint is in one paragraph, and, as originally drawn, sought a recovery for thirteen mules killed by one of the appellant's trains. On the trial it appeared that the mules were killed by different trains and at different times, whereupon the appellee dismissed as to the mules killed by the north bound train, and of the ruling permitting this to be done appellant complains.

There can be no doubt under our statute and our decisions, that a plaintiff may dismiss his action at any time before the jury retire. This general doctrine we do not understand the appellant's counsel to combat; but, as we understand them, their contention is that the court ought to have required the appellee to particularly designate the mules for which a recovery was sought. We do not think the question now argued was so presented to the trial court as to make it available on appeal. A general objection only was made to the plaintiff's motion to dismiss the action as to all the mules killed by the north bound train. The evidence showed very clearly and definitely what mules were killed by the south bound train for which a recovery was asked, and the trial court and the parties were, therefore, fully advised as to the particular animals for which a recovery was sought. Had the appellant desired that the complaint should be made more specific, the appropriate remedy was a motion to that effect, and not a general objection to the appellee's offer to dismiss. The principle runs through all our decisions that objections, in order to be available, must be specifically made in the trial court, and that mere general objections will not be available on appeal.

The appellant submitted to the court interrogatories, and

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asked that they should be submitted to the jury, but the court, instead of submitting those asked by the appellant, prepared and submitted interrogatories of its own. The prayer for the submission of the interrogatories to the jury was not a proper one, for the court was not asked to instruct the jury to answer the interrogatories in the event that they returned a general verdict. *Taylor v. Burk*, 91 Ind. 252.

We have, however, examined the interrogatories, and find that those propounded by the court substantially covered those asked by the appellant, so far as they were competent and material. Our decisions are that it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury. *Killian v. Eigenmann*, 57 Ind. 480.

The court submitted this interrogatory: "Could the defendant have lawfully fenced its track at the point where said mules entered upon the track?" It is contended that this interrogatory is not a proper one, as it calls upon the jury to decide a question of law, and not of fact, and thus casts upon them a duty that the court should perform. We can perceive no answer to this contention, and appellee's counsel have not suggested any. Our statute makes it the duty of the court to submit to the jury only questions of fact, and the question here submitted is, it seems to us, one of law. The purpose of addressing interrogatories to juries is to elicit decisions upon matters of fact, and not to ask them to state conclusions of law. Whether the track of a railroad company is, or is not, lawfully fenced, is a mere conclusion to be deduced from the facts. We have repeatedly decided that parties are entitled in special verdicts and in special findings to a statement of the specific facts, and that statements of mere conclusions will not be sufficient. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and authorities cited; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

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That principle governs here. The jury should be required to state facts, and not conclusions of law, and the answer to the question propounded in this instance could be, as it was, nothing more than the statement of the jury's conclusion as to whether the railroad company could lawfully fence its track at the place where the mules entered upon it. Whether it could lawfully fence at that place depended upon the character and surroundings, and when these are fixed the question whether it could be lawfully fenced becomes one of law for the decision of the court. There are many facts which make it improper for a railroad company to fence, as, for instance, the fact that to fence would interfere with the discharge of the company's duty to the public, or would make the place dangerous to its servants, and it is for the jury to state the facts, leaving the law to be applied by the court to the facts found by the jury.

It was held in the case of *Jeffersonville, etc., R. R. Co. v. Underhill*, 40 Ind. 229, that an allegation that the railroad was "not fenced according to law," was the statement of a legal conclusion, and this general principle is declared in many cases. *Indianapolis, etc., R. R. Co. v. Bishop*, 29 Ind. 202; *Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380; *Pittsburgh, etc., R. R. Co. v. Brown*, 44 Ind. 409; *Singer Manufacturing Co. v. Effinger*, 79 Ind. 264.

We think it clear on principle and authority that the court erred in submitting the interrogatory under immediate mention to the jury. In view of the fact that the court rejected interrogatories submitted by the appellant, and undertook to, substitute those of its own, the error must be regarded as a material one. It would defeat the manifest purpose of the statute to allow conclusions of law, rather than statements of facts, to be made by the jury, for the purpose of the statute is to get upon record the specific and material facts in the form of answers to interrogatories.

Judgment reversed.

Filed May 25, 1886; petition for a rehearing overruled Sept. 17, 1886.

Thorp *et al.* v. Hanes.

No. 12,349.

THORP ET AL. v. HANES.

DESCENT.—Childless Second Wife.—Rights of Children of Husband by First Marriage.—Where a husband dies without living issue by a second wife, who survives him, but with living children by a former wife, the land which descends to such second wife at her death descends to his children by the first marriage.

SAME.—Under the statute, a widow, who is a childless second or subsequent wife, takes one-third of her deceased husband's real estate in fee simple, with the descent cast by law, and during her life his children by a former marriage have no title to such one-third, but they acquire title by descent from her.

PARTITION.—Primary Object of Suit for.—Title.—Conclusiveness of Judgment.—While the primary object of a suit for partition is to sever the unity of possession and allot the respective shares of the parties, and not to create or vest new or settle conflicting titles, yet, if any question as to existing titles is properly made by the pleadings, and judgment is rendered thereon, the adjudication is conclusive as between the parties, but it will not affect after-acquired titles.

SAME.—Childless Second Wife.—Allotment of Interest to.—Descent.—Res Adjudicata.—Where a widow, a childless second wife, alleged in her petition for partition that she was the owner in fee simple of one-third of her deceased husband's real estate, and the judgment assumed to set apart to her such interest, such judgment will not bar the husband's children by a former marriage from setting up, as against a remote grantee of the widow, the title acquired by them at her death.

From the Marshall Circuit Court.

T. J. Payne and *S. Parker*, for appellants.

A. C. Capron and *J. D. Thomas*, for appellee.

ZOLLARS, J.—Appellants claim to be the owners of, and by this action seek to quiet the title to, the real estate in dispute, and to recover rents and profits.

Appellee also claims to be the owner of the real estate, and, by a cross complaint, asks that his title be quieted as against any claim by appellants. The court below decided in his favor, and rendered a decree accordingly.

The case comes here upon the evidence, which, in brief, is as follows: John S. Thorp, a resident of Marshall county,

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and the owner of one hundred and twenty acres of land in that county, died intestate in 1854, leaving Alice Thorp, his widow, and five children surviving, as his only heirs at law. The widow Alice was a second wife. Of this marriage one child was born, but died before the death of its father, John S. Thorp. The five children were the issue of a former marriage. The land was acquired by John S. Thorp during his first marriage. Appellants are the children and grandchildren of John S. Thorp.

In 1857, the widow Alice instituted an action in the common pleas court of Marshall county for a partition of the land, and made defendants thereto the said children of John S. Thorp, some of whom were minors.

The land, of which that in controversy is a part, was set off to said Alice as her one-third interest in the lands of her deceased husband. In 1863, she sold, and by warranty deed conveyed the land so set off to her to John T. Stiver. The land has since been sold several times, and finally the portion in controversy came into the possession of appellee, and has remained in his possession, under a warranty deed, executed on the 16th day of October, 1875. The widow Alice died intestate, in May, 1882. Since the land was set off to her, she and her grantees have been in the uninterrupted possession of it, although the general rumor in the neighborhood has been that the Thorp children claimed that it belonged to them.

In her petition for partition, the widow Alice alleged, amongst other things, that as the widow of John S. Thorp, she was the owner in fee simple, and entitled to the undivided one-third part, of the lands described as having belonged to her deceased husband, and she asked that her "proper proportion, to wit, one-third part of the same," might be set off by metes and bounds, "and for all other proper relief."

The children of Thorp being non-residents of the State, notice of the pending action was given by publication. The

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affidavit for publication, attached to the complaint, was made by the attorney for the widow, and contained the statement only, that the children, naming them, were non-residents of the State.

In the published notice, it was stated that the widow had filed her petition for partition. No mention was made, either in the published notice or in the affidavit, that any question of title was involved in the action.

After all the defendants had been defaulted, the minor children, by guardian *ad litem*, filed an answer in which it was stated that they knew of no reason why the prayer of the mother's petition should not be granted; and in which they asked that by reason of their tender years the court should protect their interests.

Upon the hearing of the case, preliminary to the final decree, the court found that the widow, Alice, was the owner in fee simple of the undivided one-third part of the real estate. In the final decree, and in appointing the commissioners to make partition, it was ordered and decreed that the one-third portion in value of the land should be set off to the widow in severalty.

In their report the commissioners stated that they had set off to the widow Alice, forty acres of the land, "as her fee simple interest, * * to have and to hold by the said Alice Thorp, her heirs and assigns in severalty, forever."

This report was by the court accepted, approved and confirmed, and it was ordered that partition should be made as in said report set forth.

Appellee rests his claim upon the record in the partition proceeding, and claims that in that proceeding all of the rights and title of appellants to the land in controversy were adjudicated, and that that adjudication is a bar to any claim of title that they may now make.

This contention can not be maintained. There having been no child of the second marriage living at the death of the father, it is conceded in argument, and settled by our cases,

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that the widow, as the second wife, took no greater interest in her husband's lands than she would have taken had no child been born of that marriage. Our cases also settle the rule in such a case to be that the land, which at the death of the husband descends to the second wife, at her death descends to the children of the husband by his former wife. *Ogle v. Stoops*, 11 Ind. 380; *Martindale v. Martindale*, 10 Ind. 566; *Rockhill v. Nelson*, 24 Ind. 422; *Louden v. James*, 31 Ind. 69; *Longlois v. Longlois*, 48 Ind. 60; *Long v. Miller*, 48 Ind. 145.

The primary object of an action in partition is not to create or vest a new title, nor to settle conflicting titles, but to sever the unity of possession and allot the respective shares. It proceeds upon the theory that the parties have title to the property which they hold in common. *Avery v. Akins*, 74 Ind. 283; *Utterback v. Terhune*, 75 Ind. 363; *Miller v. Noble*, 86 Ind. 527; *Kenney v. Phillipy*, 91 Ind. 511; *Bryan v. Uland*, 101 Ind. 477.

It is nevertheless true that in a proceeding for partition, as between persons claiming present and conflicting titles, the question of title may be presented by the pleadings, and that question tried and settled. When the question is thus properly presented and determined, the adjudication is final and conclusive as between the parties to the action. *Godfrey v. Godfrey*, 17 Ind. 6; *Milligan v. Poole*, 35 Ind. 64; *Cravens v. Kitts*, 64 Ind. 581; *McMahan v. Newcomer*, 82 Ind. 565; *Miller v. Noble*, *supra*; *Kenney v. Phillipy*, *supra*; *Fleenor v. Driskill*, 97 Ind. 27. While the title may be thus put in issue and tried, the adjudication can only operate upon existing titles, and will not affect after-acquired titles.

It becomes important, therefore, to determine what title, if any, appellants, as the children and heirs of John S. Thorp, had in the portion of the land that descended to the widow, or could have in the portion set off to her. Section 2483, R. S. 1881, which is the same as section 17, 1 R. S. 1876, p. 411, provides that if a husband die testate or intestate, leav-

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ing a widow, one-third of his real estate shall descend to her in fee simple free from all demands of creditors, where it does not exceed ten thousand dollars in value. Under this section the widow takes by descent, and as an heir of her husband. *Bowen v. Preston*, 48 Ind. 367.

The proviso to section 2487, R. S. 1881, which is the same as section 24, 1 R. S. 1876, p. 412, is, that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which at his death descends to such wife shall, at her death, descend to his children.

In a practical point of view, the childless second wife takes but a life-estate in her husband's real estate, as against his children by a former wife, because, at her death, it goes to them, under the above statutes. Some of the former cases, first above cited, seem to have adopted this practical view as the legal one, and hence treated the estate of such second wife as a life-estate only. Of course, if her estate were but a life-estate in a legal point of view, the fee in the one-third set apart to her would go by descent to the children. In such case, the children would inherit from the father and not from the widow, and the real estate thus set apart might be sold, subject to the widow's life-estate, for the payment of the husband's debts. This statute, however, provides that the one-third of the husband's lands shall *descend* to the widow, in fee simple, free from all demands of creditors, whether she be a first or second wife, and that in case of a childless second or subsequent wife, the land which, at the husband's death, *descends* to her, shall at her death *descend* to his children. Our later cases hold that the second or subsequent wife inherits from the husband, and that his children inherit from her, and take the real estate so inherited, free from the demands of the husband and father's creditors. In other words, that the widow takes the one-third of the husband's real estate in fee simple, under the statute, with the descent cast by law, and that the children have no interest

in it until after her death, whether she be the first, second or subsequent wife, and inherit from her. They further hold, that as, in a case like this, the children, during the life of the widow, have no present interest in, or title to the one-third of the real estate that goes to her, but acquire their right and title by descent from her, that right and title will not be cut off by a judgment in partition at the suit of the widow. In other words, that when the judgment in a proceeding in partition affects title, they are present titles, and not after-acquired titles.

In the case of *Avery v. Akins*, 74 Ind. 283, the final judgment in a proceeding for partition between the widow and daughter was, that the widow, her heirs and assigns forever, should hold, possess and enjoy the premises set off to her, free from any and all claims or demands from the children. In speaking of the effect of that judgment, WORDEN, J., delivering the opinion of the court, said: "The judgment, doubtless, cut off any right or supposed right which the plaintiff (daughter) then had in the share set off to Mrs. Lindsay (widow); but it did not in any manner affect any right that she might afterwards acquire to that share. The judgment dealt with then existing rights, and none other. The right which the plaintiff now sets up to that share did not exist at the time of the partition, but has accrued since." It was further held that a quitclaim deed by the daughter for the real estate set off to the widow, executed during the life of the widow, did not estop her to claim the real estate after the widow's death. In speaking of the daughter's quitclaim deed, it was said: "But she then had no estate in the premises whatever. * * * It is well settled that such a deed will not estop her to set up her title afterwards acquired." See, also, *Kenney v. Phillipy*, *supra*.

In the case of *Bryan v. Uland*, *supra*, in speaking of the estate which a childless second wife takes in the lands of her husband under the proviso in section 2487, R. S. 1881, *supra*, it was said, after citing the later cases: "Under the construc-

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tion which this proviso has received in the foregoing cases, the estate of the widow, although a fee simple, was subject to such limitation as that at her death it descended to her deceased husband's children without regard to any conveyance she may have made during her lifetime. * * And as, during her lifetime, such children had no interest or estate in the land, nothing but an expectancy to take it as her heirs at her death, neither the quitclaim deed of the adults, nor the guardian's deed of the minors, conveyed any estate."

The land in controversy had been set off to the widow. It was recited in the decree that the widow had a life-estate in the land set off to her, and that the children owned the fee simple in the whole. It was contended that this decree fixed and settled the fee in the children, and that, therefore, their deed carried the fee. In speaking of the effect of that decree it was said: "The decree in partition did not attempt to settle any question of title between the parties, and as partition proceedings, except where the title is directly put in issue, serve only to sever the shares of the common tenants, the judgment, whatever form it may have taken, did not affect after-acquired interests. The judgment is not a vesture of title; it only separates the several interests then held."

In line with the above cases, see *Miller v. Noble*, *supra*; *Utterback v. Terhune*, *supra*; *Flenner v. Benson*, 89 Ind. 108; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Armstrong v. Carvitt*, 78 Ind. 476; *Caywood v. Medsker*, 84 Ind. 520; *McClamrock v. Ferguson*, 88 Ind. 208; *Nesbitt v. Trindle*, 64 Ind. 183; *Matthews v. Pate*, 93 Ind. 443.

Upon the foregoing authorities, we conclude that the judgment in the partition proceedings did not, and does not, bar the children of John S. Thorp from setting up the title which they have acquired by descent from the deceased widow. Taking the record of the proceedings in that case as a whole, it is apparent that the sole purpose of the action was to procure a partition, and not to quiet title, by defeating the right

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of inheritance in the children from the widow, of the portion that might be set off to her.

If that were a case to quiet title, then either party might have had a new trial as of right under the statute. But it must be apparent upon an examination of the record, that neither party to the action could have insisted upon a new trial as a matter of right. *Pipes v. Hobbs*, 83 Ind. 43.

It will be observed that in the complaint in the case last above cited, as in the partition record under examination, it was averred that the plaintiff was the owner of an interest in fee simple. So, in the case of *Luntz v. Greve*, 102 Ind. 173, the plaintiff in the action for partition averred that he was the owner of an interest in the land in fee, and yet it was held that the title to the land was not in issue. It may be observed further, that in the action for partition between the widow and appellants, the averment that the widow was the owner in fee simple of the undivided one-third of the real estate, was, in the statutory sense, true.

That simple averment, therefore, can not be said to have raised the question of the right of appellants to inherit from the widow the portion that might be set off to her. The commissioners had no authority to settle titles, and hence what they said in their report upon that subject is of no consequence.

It may be further observed that the affidavit for the publication, and the notice as published, clearly indicate that the action was simply an action for partition.

It results from our conclusions above, that so far as anything is shown by the record, appellants are entitled to the real estate in controversy, and that the trial court erred in overruling their motion for a new trial.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to sustain appellants' motion for a new trial, and to proceed with the case in accordance with this opinion.

Filed May 11, 1886; petition for a rehearing overruled Sept. 17, 1886.

The Rochester, Rensselaer and St. Louis Railway Company v. Jewell.

No. 12,648.

THE ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY
COMPANY v. JEWELL.

CORPORATION.—*Summons.—Action in One County and Process to Another.—Presumption.*—Where, in an action against a corporation, the clerk of the county in which the action is brought issues a summons for the defendant to another county, it will be presumed, in the absence of any showing to the contrary, that such summons was properly issued to, and served in, such county, under section 316, R. S. 1881, because there was no person, officer or agent of the defendant in the county where the action is pending, upon whom service could lawfully be had.

From the Miami Circuit Court.

J. S. Slick and *E. Myers*, for appellant.

G. W. Holman, *W. I. Howard*, *J. H. Bibler* and *M. L. Essick*, for appellee.

Howk, C. J.—The only errors assigned by the appellant, the defendant below, upon the record of this cause, are the overruling of its motions to quash the summons herein, and to set aside the service thereof.

It is shown by the record that, prior to the 5th day of February, 1884, this action was commenced by appellee, Jewell, against the appellant, in the circuit court of Fulton county; but there is no memorandum, recital or file-mark in the transcript before us to indicate the precise time he filed his complaint herein. On the day last named, the appellant, by its attorney, appeared specially to this action, in the Fulton Circuit Court, and moved the court in writing to quash the writ of summons herein, and, also, to set aside the service thereof. These motions were overruled by the court, and to these rulings appellant excepted, and filed its bill of exceptions; and on its further motion, the venue of the action was then changed to the court below. There the cause was put at issue by appellant's answer in general denial, and the trial thereof by the court resulted in a finding and judgment for appellee.

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Did the Fulton Circuit Court err in overruling appellant's motions to quash the writ of summons herein, and to set aside the service thereof? The writ of summons, which appellant moved the court to quash, was sealed, dated and tested by the proper clerk, on the 22d day of January, 1884, and was addressed and issued to the sheriff of Pulaski county. It commanded such sheriff to summon the appellant to appear in the Fulton Circuit Court, before the judge thereof, on the 5th day of February, 1884, to answer the appellee's complaint. The sheriff returned such writ of summons, "served by reading to, and within the hearing of," the appellant's president and secretary, on the 24th day of January, 1884. Appellant first moved the court to quash the writ, "for the reason that such summons was issued to the sheriff of Pulaski county before it was made to appear, in any manner, that no officer, upon whom service could be made, could be found in the county where this suit is pending." This motion having been overruled, appellant then moved the court to quash the writ and set aside the service thereof, for the following reasons:

"First. Such summons was issued by the clerk of this court and sent to the sheriff of Pulaski county to be there served by him, before it was in any manner made to appear that no person, officer or agent could be found in the county where this suit is pending, upon whom service could be legally made; and,

"Second. Because such summons was served by the sheriff of Pulaski county upon persons in that county, claimed to be officers of defendant, before it was in any manner made to appear that no officer, person or agent of the defendant, upon whom service could be legally made, could be found in the county where this action is pending."

This motion was also overruled by the court. The rulings upon these two motions are the only errors upon which the appellant relies for the reversal of the judgment of the trial court. From the reasons assigned by appellant in support of these motions, it is manifest that they were predicated upon

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the provisions of section 316, R. S. 1881. So far as applicable to the case in hand, and the questions presented herein for consideration and decision, this section provides as follows:

“The process against either a domestic or foreign corporation may be served on the president, presiding officer, mayor, chairman of the board of trustees, or other chief officer (or, if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent); * * * * * if none of the aforesaid officers can be found, then upon any person authorized to transact business in the name of such corporation; and if no such person, officer, or agent be found in the county where suit is pending, process may be sent, for service, to any other county in the State where such person, officer, or agent may be found.”

It is not claimed, on behalf of the appellant, that appellee's suit herein was not well and properly brought in the Fulton Circuit Court. But it is claimed that process could not be lawfully issued for the appellant, to appear and answer the complaint in such suit, to any other county than the county of Fulton, until it had been first shown, in some manner, that there was no officer, person or agent of the defendant in such county, upon whom service of such process could be lawfully made. It is further claimed by appellant that, until such showing had been made, such process could not be lawfully served by the sheriff of any county other than Fulton. Because the record of this cause contains no such showing, appellant's counsel earnestly insist that its motions to quash the process issued herein to the sheriff of Pulaski county, and to set aside the service thereof, were well taken, and ought to have been sustained. In this view of the question presented we do not concur with counsel.

Conceding, without deciding, that if, at the time of the issue and service of process herein, there had been any person, officer or agent of the appellant in Fulton county, upon whom process herein might have been lawfully served, the issue of

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process to, and its service by, the sheriff of Pulaski county were wholly unauthorized by the statute; still, it does not follow that the circuit court erred in overruling appellant's motions either to quash the summons herein, or to set aside the service thereof. The clerk of the Fulton Circuit Court issued a summons herein for the appellant to the sheriff of the county of Pulaski. With the presumptions that are always indulged by the courts, in the absence of any showing to the contrary, that public officers discharge their official duties according to law, it must be presumed, we think, in the case in hand, that such clerk properly and lawfully issued the summons for the appellant herein to the sheriff of Pulaski county, because there was no person, officer or agent of the appellant in Fulton county, where this suit was then pending, upon whom such summons could be lawfully served. This presumption in favor of the action of such clerk, in the issue of the summons herein to the sheriff of Pulaski county, and in favor of the legality of the service thereof by such sheriff, must be indulged, and would prevail until it was shown, in some manner, that there was at the time some person, officer or agent of appellant in Fulton county, where this suit was then pending, upon whom a summons herein might have been lawfully served by the sheriff of such county. *State, ex rel., v. Board, etc.*, 104 Ind. 123. No such showing was made, or attempted to be made, by the appellant in the case under consideration.

For the reasons given, we are of opinion that no error was committed by the court in overruling appellant's motions to quash the summons herein, and to set aside the service thereof.

The judgment is affirmed, with costs.

Filed Sept. 15, 1886.

The Terre Haute and Indianapolis Railroad Company v. Brown.

No. 12,635.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. BROWN.

RAILROAD.—Injured Employee.—Power of Conductor to Employ a Surgeon.—Principal and Agent.—A railroad conductor, in a pressing emergency, may employ a surgeon to attend a brakeman who is injured while on duty, and, in a proper case, bind the company for the professional services so rendered; but he can not authorize the surgeon to employ, at the expense of the company, such assistants as he may deem necessary.

From the Clinton Circuit Court.

J. G. Williams, for appellant.

J. Claybaugh and *G. Sexson*, for appellee.

MITCHELL, J.—The evidence in this case developed the following facts: On the night of July 2d, 1881, a brakeman employed upon one of the appellant's freight trains, in attempting to step from the engine, slipped, and one of his feet, coming under the wheels, was crushed. The conductor in charge of the train found the station agent, and a Dr. J. S. McMurray, with whose assistance he removed the injured brakeman to a hotel, where he left him in charge of the agent and doctor. There is some conflict in the evidence at this point, but as against the appellant it may now be assumed that Dr. McMurray said to the conductor, after making a cursory examination of the wounded foot, that he would need assistance in dressing it, and that the conductor replied: "I have not time to attend to this matter at all; you secure what assistance is necessary to do this man good work, and do it, and the railroad company will pay you and your assistants for it, whatever is necessary—whatever it is worth."

After the conductor departed, Dr. McMurray sent for Dr. Brown, who, without any other employment, assisted in performing a surgical operation on the brakeman's foot. They were occupied about three hours, and were assisted by a medical student, who administered chloroform while the surgeons amputated several of the toes, and otherwise properly dressed

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the injured member. The brakeman was on the same morning taken to his home at Logansport, and received no further attention from either of the doctors who operated upon him. After some months Dr. McMurray presented a bill to the railroad company, in which he claimed \$50 for his services, \$25 for the services of Dr. Brown, and \$5 for the use of the room, at the hotel in which the operation was performed.

Subsequently, Dr. McMurray brought suit against the appellant and recovered a judgment for \$100. Upon appeal to this court the judgment was affirmed. *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358 (49 Am. R. 752).

After the judgment in favor of Dr. McMurray was affirmed, Dr. Brown brought this suit, and upon the facts, the substance of which we have stated, had a judgment for \$100 against the appellant.

The question is, can the judgment be maintained upon the facts stated? That it can not, is, in the view we take of the case, too clear for debate.

If it be conceded that such an overwhelming emergency might arise as would create a necessity for immediate action in order to save life, or prevent great bodily suffering, and that under such circumstances a state of affairs might exist, in the presence of which one employee would have the implied power to bind the employer, in his absence, for necessary medical or surgical aid bestowed on another employee who sustained an injury, it by no means follows that the appellee was entitled to recover upon the facts in this case. If the emergency was such that we must assume that an imperious necessity existed, under which the conductor, from considerations of humanity, had authority to employ Dr. McMurray, at the expense of the company, we can not indulge the further presumption that it was necessary that he should have the power to authorize Dr. McMurray to employ other surgeons at the company's expense. Whatever authority the conductor had in that connection arose out of an implied agency, under

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which, owing to the peculiar circumstances under which he was placed, he might bind his principal by employing necessary surgical aid for the injured brakeman. No rule in the law of agency is better settled than that where an agent has authority to do a particular thing, he must do it himself. He can not, unless specially authorized, or in pursuance of some usage, delegate his authority to another. *Lyon v. Jerome*, 26 Wend. 485; Story Agency, section 13.

Assuming that the conductor, under the circumstances disclosed, had adequate authority to secure necessary surgical aid to attend the injured brakeman at the company's expense, it can not be assumed that he had authority to employ one surgeon and authorize him to employ, at the company's expense, as many more as he should think necessary. If the surgeon first employed found it necessary or convenient to call in other assistants, in order to accomplish that which he had been employed to do, in the absence of other employment than such as appears in this case, the assistants must look to him for compensation. This is according to the well settled rule that if an agent employs a sub-agent to do the whole or any part of that which he was employed to do, without the knowledge or consent of his principal, inasmuch as there is no privity between the principal and the sub-agent, the latter will not be entitled to claim compensation from the principal. *Pawnall v. Bair*, 78 Pa. St. 403; *Barnard v. Coffin*, 6 N. E. Rep. 364; *Perry v. Jones*, 18 Kan. 552; *Robbins v. Fennell*, 11 Q. B. 248; 13 Cent. L. J. 24, 27; *United States v. Driscoll*, 96 U. S. 421.

There is no pretence that Dr. Brown was employed by the conductor. The claim is that the conductor authorized Dr. McMurray to employ, at the railway company's expense, such assistants as might seem to him necessary.

Conceding, for the purpose of the case, that Dr. McMurray was employed by competent authority, the utmost that could properly have been claimed was, that he should have

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been reimbursed for any necessary outlay in procuring assistants and other things necessary to accomplish that which he was employed to do. *Board, etc., v. Brewington*, 74 Ind. 7.

We have no purpose to enter upon an examination of the general subject discussed in the briefs. These questions have been exhaustively considered in the recent cases of *Louisville, etc., R. W. Co. v. McVay*, 98 Ind. 391 (49 Am. R. 770), and *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358.

It is sufficient to say that railroads are under precisely the same obligation in respect to procuring medical and surgical aid for their employees as other employers under like circumstances, and the authority of a railroad employee is not different in that respect from the authority of one employed by any other corporation or person when placed in a like situation.

We may say there is nothing disclosed in this record, except that the person injured was a brakeman in the service of the railway company, and that upon his being injured in the manner described, the conductor employed Dr. McMurray and told him to secure all necessary assistance to take care of the injured man. When inquired of by the surgeon as to whom he should look for pay, the conductor replied, that the railroad company would pay the bills.

Because the brakeman was injured and was in the employ of the railroad company, did not of itself confer authority upon the conductor to create an obligation against the company for surgical attendance. So far as appears the brakeman may have been abundantly able, with the money in his pocket, to employ, at once, all necessary surgical attendance. Both the conductor and surgeon may have known of his ability to procure and pay for all needed assistance, and the surgeon may have been entirely willing to treat him on his own credit or responsibility.

The evidence failed in this case to show any such emergency as authorized the conductor to bind the company. It also

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failed to show that Dr. Brown was employed by any one having competent authority to that end.

The judgment is reversed, with costs.

Filed Sept. 16, 1886.

 No. 12,348.

BUSCHER v. KNAPP, ADM'R.

REVIEW OF JUDGMENT.—*Election Between Remedies.*—A party can not prosecute an appeal and a suit to review, but must elect between these remedies.

SAME.—*Pendency of Appeal.*—*How Question as to Presented.*—*Practice.*—A question of the pendency of an appeal can not be presented by a motion to dismiss the complaint to review. The proper method, where the fact that an appeal has been prosecuted is not apparent on the face of the record, is by answer.

PLEADING.—*Reply.*—*Demurrer.*—*Certainty.*—Where a demurrer to a reply is sufficient to indicate with reasonable certainty what paragraph of the answer the reply fails to avoid, it presents the question of the sufficiency of the reply.

PROMISSORY NOTE.—*Consideration.*—*Parol Evidence.*—*Advancement.*—It is competent to show by parol the consideration of a promissory note, and where it is without consideration, or executed merely as evidence of an advancement by a father to a son, it can not be enforced.

SAME.—*Pleading.*—*Will.*—Where it is answered that the note sued on was executed as evidence of an advancement, a reply that by the terms of the will of the payee such note was not intended as an advancement, is bad.

From the Hamilton Circuit Court.

D. Moss, R. R. Stephenson and W. R. Fertig, for appellant.
W. Neal, J. F. Neal and J. B. Black, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that a judgment was rendered against him in a former action brought by the appellee; that the court committed two errors in the course of that action, one in overruling a demurrer to

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a reply, and the other in admitting a will in evidence, and the prayer of the complaint is that the judgment be reviewed and annulled.

The appellee filed a motion to dismiss this suit, and an affidavit stating that the cause in which the judgment sought to be reviewed was rendered had been appealed to this court. We agree with appellee's counsel that a party can not prosecute an appeal and a suit to review, but must elect between these two remedies. *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Town of Corydon*, 80 Ind. 95; *Searle v. Whipperman*, 79 Ind. 424; *Dunkle v. Elston*, 71 Ind. 585. But while we concur with counsel in their statement of the general rule, we can not hold that the rule benefits them, for they have not properly invoked its assistance. A question of the pendency of an appeal, or of another action pending, can not be presented by a motion to dismiss. The proper method of presenting such a question, where, as here, the fact that an appeal has been prosecuted or is pending is not apparent on the face of the record, is by answer.

The reply in the original action was in two paragraphs, the first of which was a general denial. The demurrer to the reply, omitting formal parts, reads thus: "The defendant demurs to the second paragraph of the reply herein and says, that said paragraph does not state facts sufficient to avoid the allegations contained in the answer to which it is intended to be a reply." The introductory clause of the first paragraph of the reply is in these words: "The plaintiff, for reply to the second paragraph of the defendant's answer, says," and the introductory clause of the second paragraph of the reply is as follows: "And for a second and further reply the plaintiff says," and it is contended by the appellee that the demurrer is defective because it does not show what paragraph of the answer the reply is not sufficient to avoid. This contention can not prevail. We think the only reasonable and just construction of the reply is, that it was addressed to the second paragraph of the answer, and we also think

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that the demurrer fairly indicates that the reply was challenged because of its failure to state facts sufficient to avoid that answer. We are of the opinion that where a demurrer is sufficient to indicate with reasonable certainty what paragraph of the answer the reply fails to state sufficient facts to avoid, it presents the question of the sufficiency of the reply.

The complaint in the original action was upon two notes executed by the appellant to his father, then in life, but deceased at the time the action was brought. The second paragraph of the appellant's answer to that complaint alleges, that the notes sued on were executed as evidence of advancements made to the appellant by his father, and upon the latter's representations that "he only wanted the notes to satisfy his other children, and that he still intended the sums of money evidenced by the notes as an advancement of that much of his estate to the defendant, and that said sums of money, after his death, should be charged to the defendant." We hold the answer good. It is competent to show by parol the consideration of a promissory note, and where a note is shown to be without consideration, or is shown to be executed merely as evidence of an advancement by a father to a son, it can not be enforced. *Peabody v. Peabody*, 59 Ind. 556, and authorities cited. The answer before us shows that the notes sued on were executed simply as evidences that the father had advanced to the son the sums named in them.

The second paragraph of the reply avers that the payee of the notes was the father of the appellant; that he died testate; that by the terms of the will of the testator the notes were not intended for an advancement. We deem this reply bad. It counts wholly upon the will; it does not aver that the notes were not executed as evidences of advancements. The averment does not refer to the time the notes were executed, nor to the agreement then made, but refers exclusively to the will. We suppose it to be too clear for argument that where a father does advance money to his son, and receives notes as mere evidences of advancements, he can not, by

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his will, change the nature of the transaction. Had the reply denied that the notes were executed as evidences of advancements, there would then be great force in the appellees' contention that the reply was good as an argumentative denial; but this it does not do. It confesses—because it does not deny—the allegations of the answer, that the notes were executed as evidences of advancements, and seeks to avoid these allegations by averring that “by the terms of the will of the decedent, the notes mentioned in the defendant's answer were not, and never were intended, for an advancement.” This averment, and it is the only one in the reply that resembles a denial, puts the whole case upon terms of the will. It is clear to our minds that the reply was fatally defective, and that the complaint for review states a cause of action.

Judgment reversed.

Filed Sept. 16, 1886.

No. 12,279.

STOUT v. THE BOARD OF COMMISSIONERS OF GRANT
COUNTY.

COUNTY COMMISSIONERS.—*Pleading.—Practice.*—No formal pleadings are required in the presentation of a claim against a board of county commissioners. It is only necessary to file a written statement or account giving the nature of the claim, and so identifying it as to bar another proceeding upon it.

SAME.—*Formal Pleadings.*—But where the parties elect to file formal pleadings and to form issues of law upon the facts contained in any of such pleadings, the sufficiency of the facts thus pleaded may be ruled upon as in other cases.

STATUTE.—*Construction.—Legislative Intention.*—In construing a statute the probable intention of the Legislature must be kept constantly in view.

SAME.—*When Intention Governs Letter.*—The legislative intention, as collected from an examination of a statute, will prevail over the literal import of particular terms, and the strict letter of the statute, when an adherence to the letter would lead to injustice, absurdity, or contradictory provisions.

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SAME.—*Uncertainty.—Legislative History.*—Where a statute is of uncertain meaning, by reason of obscurity in its phraseology, a recurrence to the circumstances under which it was passed may be had to ascertain the probable intention of the Legislature in enacting it, and to that end the legislative history of the statute may be inquired into.

SAME.—*Contemporaneous Legislation.*—In case of doubt or uncertainty, acts *in pari materia*, passed either before or after and whether in force or not, and contemporaneous legislation, not precisely *in pari materia*, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions.

SAME.—*History of Country.—Judicial Notice.*—The history of a country, its topography and general condition are elements which enter into the construction of the laws made to govern it, and are matters of which the courts will take judicial notice.

SAME.—*Fees and Salaries.—Public Sentiment.—Judicial Notice of.*—It is an historical fact, of which the courts will take judicial notice, that when the Legislature of 1879 met, and for several years previously, there was a strong public sentiment in favor of the reduction of the fees and salaries of public officers, which constituted an important factor in the preceding general election, and this circumstance may be considered in ascertaining the legislative intent in the enactment of the statute of that year on the subject of fees and salaries.

SAME.—*Act of 1879.—Compensation of County Auditor.—Cases Adhered to.—Stare Decisis.*—Under section 22 of the act of March 31st, 1879 (R. S. 1881, section 5907), concerning fees and salaries, a county auditor, in addition to his fixed salary, is entitled to \$125 per year for each one thousand inhabitants of his county over fifteen thousand and not more than twenty thousand, and \$100 for each one thousand inhabitants in excess of twenty thousand, and not to \$225 per year for each one thousand inhabitants in excess of twenty thousand. *Edger v. Board, etc.*, 70 Ind. 331, and *Parker v. Board, etc.*, 84 Ind. 340, are adhered to and the doctrine of *stare decisis* applied.

From the Grant Circuit Court.

R. W. Bailey, J. R. Coffroth, T. A. Stuart, J. S. Frazer, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, W. H. Calkins, W. F. Elliott, J. H. Baker and F. E. Baker, for appellant.

A. Steele and R. T. St. John, for appellee.

NIBLACK, J.—The appellant, Joseph W. Stout, presented a claim against the county of Grant to the board of commissioners of that county, at its March term, 1884, for an alleged

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balance due him for services as former auditor of such county. The claim was presented in the similitude of a formal complaint, averring that the appellant was auditor of said county of Grant from the 1st day of June, 1880, until the 1st day of November, 1883; that during all that time said county contained a population of twenty-four thousand persons, according to the last census taken by the United States; that the services of the appellant, as such auditor, had amounted to the aggregate sum of \$9,652.05, on account of which he had received only the gross sum of \$7,943.70, as illustrated by an accompanying bill of particulars; that the board of commissioners, herein above named, had only from time to time allowed the appellant, as a part of his salary, the sum of \$100 for each thousand inhabitants in excess of twenty thousand, when he was, as he still is, entitled to receive, under the 22d section of the act of March 31st, 1879 (R. S. 1881, section 5907), concerning fees and salaries, the aggregate amount of \$225 per year for each thousand inhabitants so in excess of twenty thousand. Wherefore the appellant demanded an allowance and judgment for \$1,708.35, as a balance remaining due and unpaid to him. •

The claim thus presented was rejected by the commissioners, whereupon the appellant appealed to the circuit court, where a demurrer was filed and sustained to the complaint, and where a final judgment upon demurrer was rendered against the appellant.

No formal pleadings are required in the presentation of a claim against a board of county commissioners. It is only necessary to file a written statement or account giving the nature of the claim, and so identifying it as to bar another proceeding upon it. *Board, etc., v. Adams*, 76 Ind. 504; *Board, etc., v. Emmerson*, 95 Ind. 579.

But where the parties elect to file formal pleadings upon such a claim, and to form issues of law upon the facts contained in any of such pleadings, the sufficiency of the facts thus pleaded may be ruled upon as in other cases. *Board,*

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etc., v. *Ritter*, 90 Ind. 362; *Wright v. Board, etc.*, 98 Ind. 108; *Board, etc.*, v. *Murphy*, 100 Ind. 570.

The question intended to be presented, and upon which alone a decision is invoked, in this case, is the same as the one involved in the cases of *Edger v. Board, etc.*, 70 Ind. 331, and *Parker v. Board, etc.*, 84 Ind. 340, and that is, to what annual compensation is a county auditor entitled under the 22d section of the act of March 31st, 1879, above referred to, for each one thousand inhabitants, where the population of his county, as shown by the last census, exceeds twenty thousand? The section in question reads as follows:

"Section 22. The auditor of each county shall be allowed the sum of twelve hundred dollars per year for his services, and no more, except as provided for in this act. When the population of his county exceeds fifteen thousand, as shown by the last preceding census taken by the United States, the additional sum of one hundred and twenty-five dollars for each one thousand inhabitants in excess of fifteen thousand shall be allowed said auditor in *addition* to his salary of twelve hundred dollars; and if the population of said county shall be more than twenty thousand, said auditor shall be allowed the *additional* sum of one hundred dollars for each one thousand inhabitants in excess of twenty thousand in said county. Each auditor shall be allowed one hundred dollars per year for making all reports, required by law, to the auditor of State. Such allowance shall be made in quarterly instalments by the board of county commissioners during their regular sessions in March, June, September and December, and paid out of any county revenue of such county not otherwise appropriated; but payment shall not be made in advance of services rendered."

In the cases named, this court construed this section of the statute to mean that a county auditor was entitled to receive only an annual compensation of \$100 for each one thousand inhabitants in excess of twenty thousand, and hence counsel for the appellant concede that, so far, the weight of authority

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in this court is heavily against the more liberal construction of the section they are now seeking to obtain. It is nevertheless most earnestly, but respectfully, contended that the construction given as above was not a well considered construction, but was, and still is, a construction placed upon a statute in palpable disregard of long established rules for the government of courts in such and similar cases, and for that reason we are asked to reconsider the question now again presented, and to adopt a different and, so-called, more liberal construction in favor of county auditors.

It is true, as contended, that in construing a statute the probable intention of the Legislature must be kept constantly in view, and that where the language of the statute is plain and unambiguous, the expressed intention of the Legislature must prevail, there being then no room left for construction. *Case v. Wildridge*, 4 Ind. 51; *Buskirk Pr.* 353; *Taylor v. Board, etc.*, 67 Ind. 383; *United States v. Fisher*, 2 Cranch, 358, 399; 1 Kent Com., pp. 460-468.

It is also true that the courts can not extend the plain meaning of a statute by the substitution, or addition, of words or phrases, without encroaching upon the legislative department of the government. *Trustees, etc., v. Ellis*, 38 Ind. 3. But the legislative intention, as collected from an examination of the whole, as well as the separate parts, of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an adherence to such strict letter would lead to injustice, to absurdity, or to contradictory provisions. *Mayor, etc., v. Weems*, 5 Ind. 547; *Buskirk Pr.* 353; *Middleton v. Greeson*, 106 Ind. 18; *Miller v. State, ex rel.*, 106 Ind. 415.

It is likewise true that the certificates of the speaker of the House of Representatives and of the president of the Senate, respectively, that an act has passed both Houses of the General Assembly, are conclusive upon the courts, and hence can not be impeached by the production of facts inconsistent with the truth of such certificates. *Evans v. Browne*, 30 Ind. 514;

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Bender v. State, 53 Ind. 254; *Board, etc., v. Burford*, 93 Ind. 383. But where a statute is of doubtful or uncertain meaning, by reason of obscurity in its phraseology, a recurrence to the circumstances under which it was passed may be had with a view of ascertaining the probable intention of the Legislature in enacting it, and to that end the legislative history of the statute may be inquired into. *The Walter A. Wood Mowing, etc., Co. v. Caldwell*, 54 Ind. 270 (23 Am. R. 641).

So, in cases of doubt or uncertainty, acts *in pari materia*, passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions, and, within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose. *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16, 32; *Douglass v. Howland*, 24 Wend. 35, 45; *Taylor v. Board, etc., supra*; Bishop Written Laws, sections 75, 76.

The history of a country, its topography, and general condition are elements which enter into the construction of the laws made to govern it, and these are matters of which the courts will take judicial notice. *Williams v. State*, 64 Ind. 553 (31 Am. R. 135).

It is a historical fact, and therefore a matter within the common knowledge of all, that at the time of the meeting of the Legislature in 1879, there was, and that for several years previously there had been, a strong public sentiment in favor of a reduction of the fees and salaries of public officers, and that the pressure of that public sentiment had constituted an important factor in the general elections which immediately preceded that meeting of the Legislature. That circumstance, taken in connection with some of the leading as well as minor provisions of the act of March 31st, 1879, justifies the inference that the object in passing that act was a reduction rather than an increase of fees and salaries. The act of March 12th, 1875, which the act under consideration

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displaced, gave each county auditor a fixed salary of \$1,500, and an additional compensation of \$125 for each one thousand inhabitants in excess of fifteen thousand. It also gave each county treasurer a fixed salary of \$1,000, with an additional and varying compensation dependent upon the amounts and character of the taxes collected. Whereas, as has been seen, the law now in force allows each county auditor a fixed salary of only \$1,200, and makes a new provision for his additional compensation when the population of his county exceeds twenty thousand. As a further examination will disclose, the present law allows each county treasurer a fixed salary of only \$800, with an additional allowance of six instead of five per centum upon the amount of delinquent taxes voluntarily paid, which, in many of the counties at least, amounts to a reduction of his aggregate compensation. Other similar illustrations might be given. While the compensation of public officers is in some instances increased, the *trend* of the act now in force is toward a reduction of fees and salaries.

Notwithstanding the contention to the contrary, there is some obscurity in the phraseology of section 22 of the act of 1879, herein above set out. Its proper construction depends upon the antecedent to which the phrase, "the additional sum of \$100 for each one thousand inhabitants in excess of twenty thousand," ought to be applied. It is conceded that the sum of \$125 allowed for each one thousand inhabitants in excess of fifteen thousand is additional to the fixed salary of \$1,200. It is also conceded that the legislative intent was to change the rate of compensation which had theretofore been allowed to a county auditor, in addition to his fixed salary, when the population of his county exceeds twenty thousand.

The fair inference would, therefore, seem to be that, in the absence of an express declaration to the contrary, this changed rate of compensation continues to be, as before, additional to the auditor's fixed salary. This inference is strengthened by the conclusion, already announced, that the evident intent of

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failed to show that Dr. Brown was employed by any one having competent authority to that end.

The judgment is reversed, with costs.

Filed Sept. 16, 1886.

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BUSCHER v. KNAPP, ADM'R.

REVIEW OF JUDGMENT.—*Election Between Remedies.*—A party can not prosecute an appeal and a suit to review, but must elect between these remedies.

SAME.—*Pendency of Appeal.*—*How Question as to Presented.*—*Practice.*—A question of the pendency of an appeal can not be presented by a motion to dismiss the complaint to review. The proper method, where the fact that an appeal has been prosecuted is not apparent on the face of the record, is by answer.

PLEADING.—*Reply.*—*Demurrer.*—*Certainty.*—Where a demurrer to a reply is sufficient to indicate with reasonable certainty what paragraph of the answer the reply fails to avoid, it presents the question of the sufficiency of the reply.

PROMISSORY NOTE.—*Consideration.*—*Parol Evidence.*—*Advancement.*—It is competent to show by parol the consideration of a promissory note, and where it is without consideration, or executed merely as evidence of an advancement by a father to a son, it can not be enforced.

SAME.—*Pleading.*—*Will.*—Where it is answered that the note sued on was executed as evidence of an advancement, a reply that by the terms of the will of the payee such note was not intended as an advancement, is bad.

From the Hamilton Circuit Court.

D. Moss, R. R. Stephenson and W. R. Fertig, for appellant.
W. Neal, J. F. Neal and J. B. Black, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that a judgment was rendered against him in a former action brought by the appellee; that the court committed two errors in the course of that action, one in overruling a demurrer to

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a reply, and the other in admitting a will in evidence, and the prayer of the complaint is that the judgment be reviewed and annulled.

The appellee filed a motion to dismiss this suit, and an affidavit stating that the cause in which the judgment sought to be reviewed was rendered had been appealed to this court. We agree with appellee's counsel that a party can not prosecute an appeal and a suit to review, but must elect between these two remedies. *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Town of Corydon*, 80 Ind. 95; *Searle v. Whipperman*, 79 Ind. 424; *Dunkle v. Elston*, 71 Ind. 585. But while we concur with counsel in their statement of the general rule, we can not hold that the rule benefits them, for they have not properly invoked its assistance. A question of the pendency of an appeal, or of another action pending, can not be presented by a motion to dismiss. The proper method of presenting such a question, where, as here, the fact that an appeal has been prosecuted or is pending is not apparent on the face of the record, is by answer.

The reply in the original action was in two paragraphs, the first of which was a general denial. The demurrer to the reply, omitting formal parts, reads thus: "The defendant demurs to the second paragraph of the reply herein and says, that said paragraph does not state facts sufficient to avoid the allegations contained in the answer to which it is intended to be a reply." The introductory clause of the first paragraph of the reply is in these words: "The plaintiff, for reply to the second paragraph of the defendant's answer, says," and the introductory clause of the second paragraph of the reply is as follows: "And for a second and further reply the plaintiff says," and it is contended by the appellee that the demurrer is defective because it does not show what paragraph of the answer the reply is not sufficient to avoid. This contention can not prevail. We think the only reasonable and just construction of the reply is, that it was addressed to the second paragraph of the answer, and we also think

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that the demurrer fairly indicates that the reply was challenged because of its failure to state facts sufficient to avoid that answer. We are of the opinion that where a demurrer is sufficient to indicate with reasonable certainty what paragraph of the answer the reply fails to state sufficient facts to avoid, it presents the question of the sufficiency of the reply.

The complaint in the original action was upon two notes executed by the appellant to his father, then in life, but deceased at the time the action was brought. The second paragraph of the appellant's answer to that complaint alleges, that the notes sued on were executed as evidence of advancements made to the appellant by his father, and upon the latter's representations that "he only wanted the notes to satisfy his other children, and that he still intended the sums of money evidenced by the notes as an advancement of that much of his estate to the defendant, and that said sums of money, after his death, should be charged to the defendant." We hold the answer good. It is competent to show by parol the consideration of a promissory note, and where a note is shown to be without consideration, or is shown to be executed merely as evidence of an advancement by a father to a son, it can not be enforced. *Peabody v. Peabody*, 59 Ind. 556, and authorities cited. The answer before us shows that the notes sued on were executed simply as evidences that the father had advanced to the son the sums named in them.

The second paragraph of the reply avers that the payee of the notes was the father of the appellant; that he died testate; that by the terms of the will of the testator the notes were not intended for an advancement. We deem this reply bad. It counts wholly upon the will; it does not aver that the notes were not executed as evidences of advancements. The averment does not refer to the time the notes were executed, nor to the agreement then made, but refers exclusively to the will. We suppose it to be too clear for argument that where a father does advance money to his son, and receives notes as mere evidences of advancements, he can not, by

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his will, change the nature of the transaction. Had the reply denied that the notes were executed as evidences of advancements, there would then be great force in the appellees' contention that the reply was good as an argumentative denial; but this it does not do. It confesses—because it does not deny—the allegations of the answer, that the notes were executed as evidences of advancements, and seeks to avoid these allegations by averring that “by the terms of the will of the decedent, the notes mentioned in the defendant's answer were not, and never were intended, for an advancement.” This averment, and it is the only one in the reply that resembles a denial, puts the whole case upon terms of the will. It is clear to our minds that the reply was fatally defective, and that the complaint for review states a cause of action.

Judgment reversed.

Filed Sept. 16, 1886.

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STOUT v. THE BOARD OF COMMISSIONERS OF GRANT COUNTY.

COUNTY COMMISSIONERS.—*Pleading.—Practice.*—No formal pleadings are required in the presentation of a claim against a board of county commissioners. It is only necessary to file a written statement or account giving the nature of the claim, and so identifying it as to bar another proceeding upon it.

SAME.—*Formal Pleadings.*—But where the parties elect to file formal pleadings and to form issues of law upon the facts contained in any of such pleadings, the sufficiency of the facts thus pleaded may be ruled upon as in other cases.

STATUTE.—*Construction.—Legislative Intention.*—In construing a statute the probable intention of the Legislature must be kept constantly in view.

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SAME.—*Uncertainty.—Legislative History.*—Where a statute is of uncertain meaning, by reason of obscurity in its phraseology, a recurrence to the circumstances under which it was passed may be had to ascertain the probable intention of the Legislature in enacting it, and to that end the legislative history of the statute may be inquired into.

SAME.—*Contemporaneous Legislation.*—In case of doubt or uncertainty, acts *in pari materia*, passed either before or after and whether in force or not, and contemporaneous legislation, not precisely *in pari materia*, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions.

SAME.—*History of Country.—Judicial Notice.*—The history of a country, its topography and general condition are elements which enter into the construction of the laws made to govern it, and are matters of which the courts will take judicial notice.

SAME.—*Fees and Salaries.—Public Sentiment.—Judicial Notice of.*—It is an historical fact, of which the courts will take judicial notice, that when the Legislature of 1879 met, and for several years previously, there was a strong public sentiment in favor of the reduction of the fees and salaries of public officers, which constituted an important factor in the preceding general election, and this circumstance may be considered in ascertaining the legislative intent in the enactment of the statute of that year on the subject of fees and salaries.

SAME.—*Act of 1879.—Compensation of County Auditor.—Cases Adhered to.—Stare Decisis.*—Under section 22 of the act of March 31st, 1879 (R. S. 1881, section 5907), concerning fees and salaries, a county auditor, in addition to his fixed salary, is entitled to \$125 per year for each one thousand inhabitants of his county over fifteen thousand and not more than twenty thousand, and \$100 for each one thousand inhabitants in excess of twenty thousand, and not to \$225 per year for each one thousand inhabitants in excess of twenty thousand. *Edger v. Board, etc.*, 70 Ind. 331, and *Parker v. Board, etc.*, 84 Ind. 340, are adhered to and the doctrine of *stare decisis* applied.

From the Grant Circuit Court.

R. W. Bailey, J. R. Coffroth, T. A. Stuart, J. S. Frazer, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, W. H. Calkins, W. F. Elliott, J. H. Baker and F. E. Baker, for appellant.

A. Steele and R. T. St. John, for appellee.

NIBLACK, J.—The appellant, Joseph W. Stout, presented a claim against the county of Grant to the board of commissioners of that county, at its March term, 1884, for an alleged

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balance due him for services as former auditor of such county. The claim was presented in the similitude of a formal complaint, averring that the appellant was auditor of said county of Grant from the 1st day of June, 1880, until the 1st day of November, 1883; that during all that time said county contained a population of twenty-four thousand persons, according to the last census taken by the United States; that the services of the appellant, as such auditor, had amounted to the aggregate sum of \$9,652.05, on account of which he had received only the gross sum of \$7,943.70, as illustrated by an accompanying bill of particulars; that the board of commissioners, herein above named, had only from time to time allowed the appellant, as a part of his salary, the sum of \$100 for each thousand inhabitants in excess of twenty thousand, when he was, as he still is, entitled to receive, under the 22d section of the act of March 31st, 1879 (R. S. 1881, section 5907), concerning fees and salaries, the aggregate amount of \$225 per year for each thousand inhabitants so in excess of twenty thousand. Wherefore the appellant demanded an allowance and judgment for \$1,708.35, as a balance remaining due and unpaid to him. •

The claim thus presented was rejected by the commissioners, whereupon the appellant appealed to the circuit court, where a demurrer was filed and sustained to the complaint, and where a final judgment upon demurrer was rendered against the appellant.

No formal pleadings are required in the presentation of a claim against a board of county commissioners. It is only necessary to file a written statement or account giving the nature of the claim, and so identifying it as to bar another proceeding upon it. *Board, etc., v. Adams*, 76 Ind. 504; *Board, etc., v. Emmerson*, 95 Ind. 579.

But where the parties elect to file formal pleadings upon such a claim, and to form issues of law upon the facts contained in any of such pleadings, the sufficiency of the facts thus pleaded may be ruled upon as in other cases. *Board,*

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No. 11,653.

NORTH ET AL. v. THE STATE, EX REL. PATE ET AL.

CORPORATION.—*Private Person Can Not Maintain Suit to Question Legal Existence.—Quo Warranto by Prosecuting Attorney.—Turnpike.—Case Distinguished.*—Where persons in good faith act under a corporate name, and exercise the rights and franchises of a corporation authorized by law, *e. g.*, a turnpike company, they become a corporation *de facto*, and a private citizen, although claiming to be a stockholder therein, can not maintain a suit to inquire into its legal existence. Such a proceeding must be brought on behalf of the State by the proper prosecuting attorney. *Albert v. State, ex rel.*, 65 Ind. 413, distinguished and modified.

From the Dearborn Circuit Court.

A. C. Downey, R. L. Davis and G. E. Downey, for appellants.

J. B. Coles, for appellees.

Howk, C. J.—The first errors complained of here by appellants, the defendants below, are the overruling of their demurrers to each of the two paragraphs of the relators' information or complaint.

In the first paragraph of their information, the relators John M. Pate and Lester Lostutter informed the court below that each of them was a citizen of this State, and that each of them, in attending to his occupation and business, was obliged to travel the road hereinafter mentioned, and that each of them was a stockholder in the pretended corporation, hereinafter mentioned, by virtue of having paid benefits assessed to lands within one and one-half miles of such turnpike road; that the appellants James North, Sr., Hugh S. Espey, Sr., John F. Whitlock, Jr., Platt Thompson, Hiram J. Calvert and John Q. Davis, without having been in any manner legally incorporated, had, under the name of "The Rising Sun and North Landing Turnpike Company," theretofore acted, and were then acting, in Ohio county in this State, as a corporation; that appellants, claiming to be a corporation, had elected a president and other officers, had made

107	356
150	480
150	439
107	356
155	64

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contracts and brought suits at law in their pretended corporate capacity, had erected and maintained a toll-gate and then maintained it across the highway, leading from the city of Rising Sun to the store of Nathan North, in Ohio county, and demanded and collected tolls and charges from citizens of the State, including the relators, and had done other acts in their pretended corporate capacity.

The relators further said, that appellants claimed to act as a corporation for the purpose of constructing and owning a turnpike or gravel road, in Ohio county, and to be organized under the act of May 12th, 1852, authorizing the construction of plank, macadamized and gravel roads, and the acts amendatory of and supplemental to such act; that appellants claimed to have united in articles of association, and to have filed a copy thereof in the recorder's office of Ohio county, on the — day of —, 1870. A copy of such articles of association was then set out; and the relators alleged that such articles were null and void, and that appellees, acting and pretending to act thereunder, were not legally incorporated for a number of specified reasons. The view we shall take of this case renders it unnecessary for us to set out these reasons, or any other averment of the first paragraph of the information, in this opinion.

In the second paragraph of the information, the relators alleged that they, and each of them, were stockholders in the pretended corporation, but did not aver how or in what manner they, or either of them, became such stockholders. They further alleged, that the appellants and many other persons claimed to have been legally incorporated under the name of "The Rising Sun and North Landing Turnpike Company," in the year 1870, under the act of May 12th, 1852, authorizing the construction of plank, macadamized and gravel roads, and acts amendatory thereof and supplemental thereto, for the purpose of constructing a turnpike road from Rising Sun to North Landing, in Ohio county; and that the appellants, without having been legally incorporated, claimed to

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be a corporation, elected officers therefor, and performed other corporate acts. This paragraph of the information contained many other allegations of fact, which need not be noticed in this opinion. Enough of each paragraph has been set forth to present fairly the grounds upon which it is claimed that appellants' demurrers thereto ought to have been sustained. As to each paragraph of the information, the cause of demurrer assigned was that it did not state facts sufficient to constitute a cause of action.

Did the circuit court err in overruling appellants' demurrers to the relators' information? We are of opinion that this question must be answered in the affirmative. It abundantly appears from the facts stated in each paragraph of the information, that the appellants and their associates were, and had been for many years prior to the commencement of this suit, a corporation *de facto*, if not *de jure*, acting under a corporate name, in the possession of corporate property, performing corporate acts, and possessing and exercising corporate rights and franchises. In such a case, it is earnestly insisted by appellants' learned counsel that the existence of the corporation, and the rights of the appellants to act as such, can only be called in question, tried and determined in a suit or proceeding instituted on behalf of the State by the proper prosecuting attorney. Counsel are right, we think, in this position.

In *Hasselman v. United States Mortgage Co.*, 97 Ind. 365, the court said: "Where the law authorizes a corporation, and there is an effort, in good faith, to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and as a general rule the legal existence of such a corporation can not be inquired into collaterally, although some of the required legal formalities may not have been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding, brought in the name of the State. * * * * No private person

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having dealings with a *de facto* corporation can be permitted to say that it is not, also, a corporation *de jure*." *Baker v. Neff*, 73 Ind. 68; *Hon v. State, ex rel.*, 89 Ind. 249; *Williamson v. Kokomo, etc., Ass'n*, 89 Ind. 389.

Whatever else may be said of the facts stated in either paragraph of the information, in the case under consideration, they fail to show any cause or right of action which appellee's relators might or could enforce against the appellants. It is not enough that the information should state such facts as would have required the appellants, in a suit or proceeding instituted on behalf of the State by the proper prosecuting attorney, to show by what warrant they claimed to exercise the rights, privileges and franchises of a turnpike corporation; for these facts were wholly insufficient to give the relators any cause or right of action against appellants. Upon the facts stated in each paragraph of the information, we are of opinion that the legal existence of the turnpike company named therein could only be inquired into at the suit of the State, instituted by the proper prosecuting attorney; and that neither the appellees, nor any other private person, can maintain such suit. *State, ex rel., v. Bailey*, 19 Ind. 452; *White v. State*, 69 Ind. 273; *State, ex rel., v. Gordon*, 87 Ind. 171.

In support of the sufficiency of the relators' information, and of their right to maintain this suit, their counsel cites and relies upon the case of *Albert v. State, ex rel.*, 65 Ind. 413. The case cited is readily distinguishable, as will be seen from an examination of the opinion therein, from the case in hand. It was in form an information, in the nature of a *quo warranto* proceeding; but, in reality, it was a suit in equity by *cestuis que trust* against their trustee, to obtain the appointment of a receiver to take possession of the assets of a bank, which had abandoned business for many years, and to compel a distribution of such assets among the parties interested therein. Whatever may be said, in the case last cited, if anything, in seeming conflict with our present holding, must be regarded as modified in accordance with this opinion.

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Our conclusion is that the circuit court erred in overruling appellants' demurrers to each paragraph of the relators' information. This conclusion renders it unnecessary for us to consider now the other errors complained of in argument by appellants' counsel.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrers to each paragraph of the information, and for further proceedings in accordance with this opinion.

Filed Sept. 14, 1886.

107	360
124	568
126	596
107	360
130	408
107	360
128	663
129	598
107	360
155	631
156	571

 No. 12,440.

BUNDY v. CUNNINGHAM ET AL.

PRACTICE.—*Admission of Evidence.*—*Objections to.*—Objections to the admission of evidence must be specifically stated to be available on appeal.

MORTGAGE.—*Foreclosure.*—*Parties.*—*Titles.*—Where one is made a party defendant to a suit to foreclose a mortgage, it is necessary for him to set up his interest, as the purpose of the statute upon the subject of parties defendants is to settle all conflicting titles and to determine the whole controversy in one suit.

JUDGMENT.—*Foreclosure of Mortgage.*—*Adjudication of Titles.*—*Conclusiveness.*—A decree, in a suit to foreclose a mortgage, adjudicating the titles involved, is conclusive upon the parties.

From the Madison Circuit Court.

E. A. Parker, H. D. Thompson and T. B. Orr, for appellant.

M. S. Robinson and J. W. Lovett, for appellees.

ELLIOTT, J.—This appeal is prosecuted by John P. Bundy alone, although there were other defendants joined in the suit with him. The complaint alleges that the appellees are the owners in fee of the land described in the complaint, and asks that their title be quieted. It thus sets forth the claim

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of Bundy: "Plaintiffs further say that, on the 6th day of January, 1871, one Henry H. Markle and Julia A. Markle, his wife, executed to one Jasper Nelson a mortgage upon the aforesaid lands to secure the payment of a note for \$675, which mortgage was duly recorded on the 11th day of January, 1871; that afterwards John P. Bundy, being the owner and holder of said mortgage, brought his action in the Madison Circuit Court to foreclose said mortgage, making defendants thereto Henry H. Markle, Julia A. Markle, Laban Dobson, Mary Dobson, George L. Cunningham and Mary Cunningham. That upon the issue joined in said cause the same was tried and determined, and the finding of said court was for the defendants George L. Cunningham and Laban Dobson, and judgment was rendered in their favor for costs. And the plaintiffs aver that the title of the said Henry H. and Julia A. Markle failed, and at the time of said action to foreclose said mortgage, George L. Cunningham and Laban Dobson held title to said land; that the defendant John P. Bundy claims some interest in said lands by reason of the aforesaid mortgage and the foreclosure thereof."

The only error assigned is the ruling denying the appellant a new trial.

As the complaint specifically describes the nature of the claim asserted by Bundy, there was no error in permitting the appellees to give evidence of the proceedings in Bundy's foreclosure suit, and as they proved that all of the pleadings in that suit had been destroyed by a fire which consumed the court house and public records of Madison county, it was proper to prove by parol the contents of those pleadings.

As we understand appellant's counsel, they claim that the testimony as to the contents of the pleadings was incompetent, because it did not appear that the copies offered were those placed on file when the foreclosure suit was reinstated. But, whatever may be thought of the soundness of this position, the objection stated to the trial court, that the evidence was "irrelevant, incompetent and immaterial," is too general

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to present the question now argued in this court. *Shafer v. Ferguson*, 103 Ind. 90, and cases cited; *Grubbs v. Morris*, 103 Ind. 166; *Stanley v. Sutherland*, 54 Ind. 339.

The appellees introduced in evidence the mortgage executed to Nelson, the pleadings and the decree in the foreclosure suit instituted by Bundy. The complaint in that suit was in the usual form, and the answer was in three paragraphs. The first was a general denial; the second averred that the mortgagors had no title or right to the land described in the mortgage, and that it was owned in fee by the grantors of the appellee at the time the mortgage was executed; the third paragraph set up the facts specifically, showing that the mortgagors had no title, and that the land was owned in fee by the appellees and their grantors. In the introductory part of the decree it is stated that the "Court finds for the plaintiff as against Henry H. Markle and Julia A. Markle," and then follows a finding as to the execution of the mortgage by those persons, after which is the following: "And the court further finds in favor of Laban Dobson, Mary Dobson, George L. Cunningham and Mary Cunningham, and that they recover their costs of said plaintiff." The direction as to the sale of the land is as follows: "It is further considered, adjudged and decreed by the court, that all of the right, title, interest and equity of redemption of the said Henry H. Markle and Julia A. Markle be sold." The adjudging part of the decree contains the following: "It is further adjudged and decreed by the court, that the said Laban Dobson, Mary Dobson, George L. Cunningham and Mary Cunningham, and each of them, recover of said plaintiff their costs in this behalf expended."

It was competent, and, indeed, necessary, for the appellees to assert title to the property which Bundy sought to subject to the lien of his mortgage. The purpose of our liberal statute upon the subject of parties defendants is to settle all conflicting titles, and to determine the whole controversy in one suit. *Craighead v. Dalton*, 105 Ind. 72; *Barton v. Anderson*,

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104 Ind. 578; *Randall v. Lower*, 98 Ind. 255; *Masters v. Templeton*, 92 Ind. 447; *Woodworth v. Zimmerman*, 92 Ind. 349; *Hose v. Allwein*, 91 Ind. 497, *vide* p. 501; *Ulrich v. Drischell*, 88 Ind. 354; *Aetna Life Ins. Co. v. Finch*, 84 Ind. 301; *Harrison v. Phoenix Mut. Life Ins. Co.*, 83 Ind. 575; *Davenport v. Barnett*, 51 Ind. 329; *Greenup v. Crooks*, 50 Ind. 410; *Ewing v. Patterson*, 35 Ind. 326.

In this instance the appellees accepted the challenge tendered them, and asserted that the mortgagors had no title to the land they assumed to mortgage. They thus put in issue the right of the appellant to a decree ordering the land sold to pay the debt for which the mortgagors assumed to pledge it, and on that issue the decree is in their favor, for it finds against the mortgagors, but not against the appellees. Nor does the finding stop with a statement limiting it to the mortgagors, for it expressly finds in favor of the appellees, and this finding is followed by a proper decretal order.

The appellant had an opportunity to litigate the question of his right to subject the land to the lien of the mortgage, and if there had been no express finding and judgment in favor of the appellees and against him, he would have been bound by the judgment. *Fischli v. Fischli*, 1 Blackf. 360. This doctrine is maintained in many decisions of this court; the cases are far too numerous to justify a citation, and of the many we cite but a few: *Ulrich v. Drischell*, *supra*; *Elwood v. Beymer*, 100 Ind. 504; *Farrar v. Clark*, 97 Ind. 447; *State, ex rel., v. Krug*, 94 Ind. 366; *Sauer v. Twining*, 81 Ind. 366; *Green v. Glynn*, 71 Ind. 336. But in this case the pleadings put the question of the validity of the mortgage lien directly in issue, and the decree adjudged that issue in favor of the appellees, so that nothing can be clearer than that it settles that issue against the appellant. As the title of the appellees was not ordered sold, and as the judgment was in their favor, it inevitably follows that the appellant could acquire no title against them under the mortgage or the decree. As the

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mortgage is the only foundation for his title, when that fell the title was swept away.

The decree is a final one. *Western Union Tel. Co. v. Locke*, ante, p. 9. Nothing remained for the court to do. All questions were settled, and the decree can not be collaterally impeached; nor is it affected by a judgment rendered in a case between other parties.

Judgment affirmed.

Filed Sept. 15, 1886.

No. 12,068.

HARDY ET AL. v. MCKINNEY.

DRAINAGE.—*Act of March 9th, 1875.—Repeal.*—The drainage act of March 9th, 1875, was not repealed by the act of March 13th, 1879, and one petitioning for drainage in 1880 had the option of proceeding under either act.

SAME.—*Appeal from Board of Commissioners.—Trial.*—Under the statute, section 5777, R. S. 1881, appeals from the board of commissioners stand for trial *de novo* in the circuit court. Such appeals suspend all the proceedings had upon questions in issue before the commissioners, and they can not either be used or taken into consideration upon the trial in the circuit court.

SAME.—*Finding and Judgment in Circuit Court.—What Required.*—In appeals to the circuit court in drainage and analogous proceedings, the court or jury trying the same succeed to all the substantial duties of the viewers and reviewers, and the finding or verdict should be sufficiently specific upon every question involved to authorize a judgment finally determining all the matters in controversy.

SAME.—*Remanding Cause to Commissioners.*—For a judgment remanding a cause to the board of commissioners held not sufficient as “an order how to proceed” within the meaning of section 5778, R. S. 1881, see opinion.

SAME.—*Establishment of New on Line of Old Ditch.—Second Assessment.*—Where it is sought to establish a ditch upon the line of one previously constructed, and for which the persons affected by the proposed new ditch had been assessed, such facts may be shown in behalf of the remonstrators.

From the Cass Circuit Court.

107	364
194	84
194	410
107	364
198	818
107	364
181	668
132	144
107	364
136	450
107	364
137	224
137	390
107	364
145	493
107	364
148	150
107	364
155	656
107	364
167	367
107	364
158	447
107	364
1171	112

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J. A. Sims, J. W. Wallace, J. C. Nelson and Q. A. Myers,
for appellants.

J. Applegate and C. R. Pollard, for appellee.

NIBLACK, J.—On the 31st day of December, 1880, John McKinney filed his petition before the board of commissioners of the county of Carroll, representing that he was the owner of a particularly described tract of land in that county, upon which, and the adjacent lands of Alexander Hardy, Thomas Hardy and William Hardy, there was a shallow and stagnant pond of water, covering for the greater part of each year about fifteen acres of ground; that during wet seasons said pond rendered nearly, if not quite, twenty acres of valuable land unfit for cultivation; that during the summer months such pond was very injurious to the health of the neighborhood; that there was no natural outlet to the pond in question, but that it, together with other contiguous wet land, could be drained by the construction of a proposed and particularly defined ditch, of about two and one-third miles in length; also representing that such a ditch would be conducive to public health and a work of public utility, and praying that proceedings might be taken for the construction of the ditch as proposed.

At a special meeting of the board of commissioners above named, held in January, 1881, viewers were appointed, who, in April following, reported in favor of the construction of a ditch as prayed for by the petition. Notice of the pendency of the petition was thereupon given in accordance with the provisions of the second section of the act of March 9th, 1875, concerning the reclamation of wet lands, and the 8th day of June, 1881, was fixed for the hearing of the matters contained in the petition.

At the time fixed for the hearing, the Hardys entered an appearance, and moved to dismiss the proceeding upon the ground that it had been instituted and prosecuted under the provisions of the act of March 9th, 1875, *supra*, instead of

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the later act of March 13th, 1879, then and previously in force; but their motion was overruled. The Hardys then filed a remonstrance against the construction of the proposed ditch; also a claim for compensation. The following were assigned as causes of remonstrance:

First. That the proposed ditch is identical with, and in fact the same ditch heretofore established by this board, having the same beginning and the same ending, the same average depth, same slope, and the same fall per mile.

Second. That there is now constructed a ditch on the identical line of said proposed ditch, having the same length, depth, and fall per mile of the proposed ditch for the distance of 11,194 feet computed from the terminus of said proposed ditch, which is now in successful operation, and no ditch is therefore necessary or required upon said portion of said line.

Third. That all persons mentioned in said petition as being interested in the construction of said proposed ditch, and owning lands liable to be assessed for the construction thereof, have heretofore, by order of this board, been assessed, and most of them have paid such assessment, and can not be again assessed for the same ditch.

Fourth. That the construction of said proposed ditch will not be necessary and conducive to public health, convenience or welfare, and will not be of public utility, and is not necessary.

Fifth. That all of said proposed ditch, excepting about eighty rods at the upper end thereof, has heretofore been dug and fully completed in accordance with the specifications of said proposed ditch; that the excavation of the said eighty rods of ditch would drain a pond of valuable stock water on the lands of said remonstrants and greatly damage them in the business of stock herding and raising, in which they are largely engaged; that said remonstrants are now constructing a tile ditch by which said pond of water will be drained to another part of their lands, where they can utilize it for

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stock water, and wholly remove it from the lands of said McKinney; that, if removed by the excavation of said eighty rods of said proposed ditch, it would damage the said remonstrants in the sum of \$2,000; that the construction of said eighty rods of ditch by the said McKinney, and all others, has been forbidden and forever enjoined by the order of the judge of the Carroll Circuit Court, and can not now be constructed but in contempt of said order, which order is now of record, unreversed and unappealed from and in full force.

Sixth. That the assessment made by said viewers of \$1,760.15 for the cost of constructing said proposed ditch is false and fraudulent in this, to wit, that 11,194 feet of said proposed ditch is already completed and will cost nothing to make, and that the eighty rods of said proposed ditch at the upper end yet to be made would comprise the whole cost of said proposed ditch, which, according to the report of said viewers, would not cost more than the sum of \$424.85.

Reviewers were thereupon appointed, who reported, in general terms, against the Hardys, and the board of commissioners ordered the establishment and construction of the ditch.

The Hardys appealed to the circuit court, from which there was a change of venue to the White Circuit Court, where the venue was again changed to the Cass Circuit Court. During the progress of these latter proceedings William Hardy died intestate, and Mary C. Hardy, his widow, and Wilson A. D. Hardy, Juniata M. Hardy and William Hardy, Jr., his only children, were substituted as parties to the appeal.

The Hardys also renewed their motion to dismiss the petition, and all the proceedings which had been taken upon it, and their motion was again overruled.

After obtaining jurisdiction of the cause, the Cass Circuit Court proceeded to try the issues presented by the petition and the remonstrance, and, after hearing the evidence, made a finding "for the petitioner, John McKinney, and against the remonstrators, the Hardys, as to damages." Motions for a

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venire de novo, for a new trial, and in arrest of judgment, being first severally overruled, judgment was rendered upon the finding as follows: "It is therefore considered, ordered and adjudged by the court, that the ditch described in the petition filed by John McKinney before the board of commissioners of the county of Carroll, * * * * is of public utility; that it will be conducive to the public health; that the construction thereof will cause no damage to the remonstrants and appellants herein, and that the same ought to be, and is hereby, established in accordance with the prayer of said petition, and the action of said board of commissioners in the premises is hereby confirmed and the cause is hereby remanded to the board of commissioners of the county of Carroll, * * * * who are hereby ordered to take such further steps as by law may be required in the construction of said ditch subsequently to the time the proceedings before said board in this proceeding were arrested by said appeal; and it is further adjudged and decreed that all further steps as against the original appellant, William Hardy, on account of his death pending the proceedings, be now waged against his heirs at law, Mary C. Hardy, Wilson A. D. Hardy, Juniata M. Hardy and William Hardy." This was followed by a judgment against the Hardys for costs, and an order that the clerk should transmit a certified transcript of the proceedings had upon the appeal, together with the original papers, to the board of commissioners of Carroll county. Objections to the judgment were interposed by the Hardys, and exceptions were reserved.

The first question presented upon this appeal is upon the refusal of the circuit court to dismiss the proceeding, and in support of the alleged error of that refusal, it is contended that the provisions of the act of March 13th, 1879, are inconsistent with those of March 9th, 1875, upon which the proceedings in this cause are based, and that, for that reason, the provisions of this last named act are impliedly repealed by the later act of 1879.

The 21st section of the act of 1879 enacts that the act of

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" March 9th, 1875, shall not be in any way affected by the provisions of this act, but this act and said last mentioned act shall be entirely separate, and neither shall be so construed as to affect or modify the other." In construing that provision in the case of *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156), this court said: "We think that there is no such irreconcilable conflict between the two acts as requires us to hold that the earlier must give way, and the case is, therefore, not within the rule declared in the cases of *Bate v. Sheets*, 64 Ind. 209; *Deisner v. Simpson*, 72 Ind. 435." Regarding the construction of the clause of the statute, above set out, as the proper construction, it follows that when the petition in this case was filed, the petitioner had the option of proceeding under either the act of 1875 or of 1879, as he might prefer, and that the circuit court did not err in overruling the motion to dismiss the petition, and the intervening proceedings upon it.

The act of 1875 contains a provision that "Any party aggrieved may appeal to the circuit court as provided by law for appeal from commissioners." The statute then, and continuously since in force, on the subject of appeals from boards of commissioners provided that "All appeals thus taken to the circuit * * * court, shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause." 1 R. S. 1876, p. 357, section 36; R. S. 1881, section 5777. Under this provision of the statute it has always been held that appeals from commissioners stand for trial *de novo* in the circuit court, that is, that all matters in issue before the commissioners stand for trial anew in the circuit court, and not for review or correction as in a court of errors. As a necessary consequence, it has been further held that such appeals suspend all the proceedings had upon questions in issue before the commissioners, and that such proceedings can not either be used, or taken into consideration, upon the trial *de novo* in the circuit court.

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These holdings are, as they long have been, the established law of this State. *Molihan v. State*, 30 Ind. 266; *Mandlove v. Pavy*, 33 Ind. 505; *McPherson v. Leathers*, 29 Ind. 65; *Coyner v. Boyd*, 55 Ind. 166; *Turley v. Oldham*, 68 Ind. 114; *Green v. Elliott*, 86 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453; *Peed v. Brenneman*, 89 Ind. 252; *Irwin v. Lowe*, 89 Ind. 540; *Meehan v. Wiles*, 93 Ind. 52; *Lowe v. Ryan*, 94 Ind. 450; *Clift v. Brown*, 95 Ind. 53; *Thompson v. Deprez*, 96 Ind. 67; *Stockwell v. Brant*, 97 Ind. 474; *Bradley v. City of Frankfort*, 99 Ind. 417; *Thayer v. Burger*, 100 Ind. 262; *Black v. Thomson*, ante, p. 162; *Reynolds v. Shults*, 106 Ind. 291.

In appeals to the circuit court in causes like the one in hearing, and in all analogous cases, the court or jury trying the same succeeds to all the substantial duties which devolved upon the viewers and reviewers before the board of commissioners as to the matters which stand for trial *de novo*, and a finding or verdict in detail upon all the matters in issue between the parties is contemplated. This includes the assessment of benefits, and the allowance of damages in cases in which damages ought to be allowed. The finding or verdict ought to be sufficiently specific upon every question involved to authorize a judgment finally determining all the matters in controversy, and leaving nothing for the adjudication of the commissioners in the event that the cause shall be certified back to them.

Tested by this rule, the finding in this case was too general and too indefinite to authorize a judgment finally disposing of the cause, and hence was not such a finding as is contemplated by the general law governing such and similar appeals. The circuit court, therefore, erred in refusing to grant a *venire de novo* in the cause. *Jenkins v. Parkhill*, 25 Ind. 473; *Housworth v. Bloomhuff*, 54 Ind. 487; *Parker v. Hubble*, 75 Ind. 580; *Ridcnour v. Miller*, 83 Ind. 208; *Green v. Elliott*, *supra*; *Thames L. & T. Co. v. Beville*, 100 Ind. 309.

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Then, too, the judgment in this case did not, as it could not, supply the defects and omissions in the finding.

The statute on the subject of appeals from commissioners further provides that "Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises." R. S. 1881, section 5778.

The judgment in question was not, and did not assume to be, "a final determination of the proceeding" within the meaning of this statute. Nor was that part of the judgment sending the cause back to the commissioners of Carroll county "an order how to proceed" within the statutory meaning of that phrase. On this subject, see the cases of *McPherson v. Leathers* and *Mandlove v. Pavy*, above cited, and the case of *Sunier v. Miller*, 105 Ind. 393.

This cause was tried in many respects as a case upon review merely in an appellate court, and hence not exclusively as an original cause. It was placed and continued upon the docket as "Alexander Hardy and others against John McKinney," instead of "John McKinney against Alexander Hardy and others," as it should have been. This was of itself a harmless error, but it was indicative of an erroneous theory as to the proper *status* of the case in the circuit court. In the class of cases to which this belongs the petitioners are the plaintiffs and the remonstrants are the defendants. *Board, etc., v. Small*, 61 Ind. 318.

The remonstrants offered evidence in support of their first three causes of remonstrance, but the evidence thus offered was excluded. This was also erroneous. It was erroneous for reasons given in the case of *Drebert v. Trier*, 106 Ind. 510.

The proposed evidence was also admissible under the provisions of the 15th section of the act of March 9th, 1875, which provides that, under certain circumstances, parties

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shall not be assessed the second time for the drainage of the same lands.

The judgment is reversed with costs, and the cause remanded for a new trial.

Filed Sept. 17, 1886.

107	379
137	235
107	372
139	533
107	372
148	187

No. 13,210.

HUDSON v. THE STATE.

CRIMINAL LAW.—Murder.—Evidence.—For evidence considered and held sufficient to sustain a conviction for murder in the first degree, see opinion.

SAME.—Weight and Sufficiency of Evidence.—Supreme Court.—Practice.—Where the evidence tends to support the verdict on every material point, the Supreme Court will not reverse the judgment merely on the weight or sufficiency of the evidence.

From the Perry Circuit Court.

W. H. Thomas, for appellant.

F. T. Hord, Attorney General, *W. A. Land*, Prosecuting Attorney, and *H. M. Logsdon*, for the State.

Howk, C. J.—The indictment in this case charged the appellant with the crime of murder in the first degree, in feloniously, purposely and with premeditated malice, unlawfully killing one Stephen Ellis, on the 30th day of January, 1886, at the county of Spencer. Upon his arraignment in the Spencer Circuit Court, the appellant said for his plea to such indictment, that he was not guilty as therein charged. Afterwards, on his application, the venue of the cause was changed to the court below. There, the issues joined were tried by a jury and a verdict was returned finding appellant guilty of murder in the first degree, as charged in the indictment, and assessing his punishment at imprisonment for life in the State's prison. Over his motion for a new trial, the court rendered judgment on the verdict.

107	372
169	508

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In this court, the only error assigned by the appellant is the overruling of his motion for a new trial. The only causes assigned for such new trial were, that the verdict of the jury was contrary to law and was not sustained by sufficient evidence. It is claimed, on behalf of the appellant, that if the evidence was sufficient to show that he was guilty of any degree of felonious homicide, in the killing of Stephen Ellis, it was of no higher grade or degree than voluntary manslaughter; and that the evidence wholly failed to show that, in the killing of Ellis, he was guilty of murder in the first degree, as found by the jury. The evidence is properly in the record, and it has been carefully read and considered. It showed with reasonable certainty that the appellant was in the town of Rockport, in Spencer county, during the afternoon of January 30th, 1886; drinking intoxicating liquors at different saloons; that he purchased a revolver at one place, and having procured cartridges therefor he loaded the same and placed it in his pocket; that, in the evening of that day, he entered a saloon where Ellis and a friend were engaged in conversation, and addressed them rudely and insolently; that soon afterwards appellant and Ellis and three or four other persons left the saloon and started for their several homes; and that they had not proceeded far until appellant and Ellis, who were walking side by side, became involved in a fist-fight and scuffle, but they were soon separated without material injury to either of them. It is further shown by the evidence, that a few minutes afterwards Ellis started off by himself in the direction of his home; and that thereupon the appellant stepped out in front of Ellis, and, with his revolver, shot him in the right side of his breast, from which wound death ensued almost immediately.

Upon such facts as these, which there was evidence tending to establish, we are of opinion that the jury were fully authorized to find the appellant guilty of murder in the first degree, in killing Stephen Ellis. On the trial of the cause, appellant was a witness in his own behalf, and his version of

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the tragic events resulting in the death of Ellis differed materially, in many particulars, from that given by the other witnesses, the substance of which we have heretofore stated. If the jury had believed appellant's testimony, we may well suppose their verdict would have been very different from what it was. It is manifest, however, that the jury did not believe such testimony, and, as they were the exclusive judges of the credibility of the witnesses, it was for them to determine which of the witnesses were the more worthy of belief. There is evidence in the record which strongly tends, we think, to sustain the verdict of the jury on every material point; and such verdict was approved by the learned judge who presided at the trial below and heard all the evidence. In such a case, it is settled that this court will not, even in a criminal cause, disturb the verdict or reverse the judgment merely on the weight or sufficiency of the evidence. *Clayton v. State*, 100 Ind. 201; *Padgett v. State*, 103 Ind. 550; *Kleespies v. State*, 106 Ind. 383.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Sept. 16, 1886.

No. 13,199.

VOGEL v. THE STATE, EX REL. LAND, PROSECUTING
ATTORNEY.

OFFICE AND OFFICER.—*Contest Between Claimants of Office.*—*Quo Warranto by State.*—The fact that a contest proceeding between the persons claiming a public office is pending, does not affect the right of the State to proceed by information against the incumbent.

SAME.—*Justice of Peace.*—The office of justice of the peace is a judicial office under the Constitution and statutes of this State.

SAME.—*Judicial Office.*—*Constitutional Ineligibility.*—*Extent of.*—A judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term, the disability imposed

107	374
160	188

107	374
168	517

107	374
169	68

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by the Constitution merely having reference to the taking and holding of the office.

NAME.—Term of Office.—Computation of Time.—Township Trustee.—Where an officer's commission fixes his term at four years from a certain day, that day will be counted as a part of the term; but where it is provided by the law that the inspectors' certificate of election shall entitle the holder to qualify and enter upon the discharge of the duties of the office of township trustee at the expiration of ten days from the day of election, the day of the election is to be excluded in computing the time.

SAME.—Judicial and Other Office Ending and Beginning on Same Day.—Where the term of a justice of the peace did not expire until midnight of the 16th day of the month, he is ineligible to hold the office of township trustee where the term of such office began on the same day.

SAME.—Votes Cast for Ineligible Can Not be Counted Against Eligible Candidate.—The votes cast for an ineligible candidate can not be counted against a candidate who is eligible, and the latter, if he has received the next highest number of votes, is entitled to the office.

From the Perry Circuit Court.

W. Henning and *E. C. Vance*, for appellant.

W. A. Land, Prosecuting Attorney, and *C. H. Mason*, for the State.

ZOLLARS, J.—The prosecuting attorney, by an information in the name of the State, challenges the right of appellant to hold the office of township trustee in and for Troy township, in Perry county.

The sufficiency of the information is questioned by a general statement in appellant's brief, but as no specific objection is pointed out, and we discover none, we pass to a consideration of the alleged error of the court below in sustaining a demurrer to appellant's plea in abatement. It is alleged in the information that appellant had intruded himself into the office of township trustee and excluded therefrom the properly elected and qualified trustee, one Nicholas Marks.

In answer to this charge, appellant pleaded by way of abatement, that he had been elected trustee of the township in 1884; that at the April election, in 1886, he and Marks were rival candidates; that, although Marks received the highest number of votes, he was not, and could not be, elected,

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because he was ineligible to the office by reason of being a justice of the peace; that appellant, in the statutory mode, contested Marks' right to the office; that the board of commissioners decided that neither party was eligible; that both took an appeal to the circuit court, and that the case was pending in that court when the information and plea were filed in this case.

The court below properly sustained the demurrer to this plea. The result of the contest, if prosecuted to final judgment, might be the same to the contestants, as the result to be attained by this prosecution, but the parties to the two actions are not the same. In the contest, appellant and Marks are contesting the right to the office as between themselves; here, the State is the moving party, and is not interested in the success of either of the rival claimants, except so far as one or the other may be eligible and the lawfully elected trustee.

The rights of the State in a matter of this kind are above the rights of individual claimants, and its rights will not be affected by any proceeding that such parties may institute as between themselves. If it were otherwise, the State might be rendered powerless to eject from office an intruder placed in it by a collusive litigation.

The controlling facts upon which the case was submitted below are as follows: In 1882, Nicholas Marks, having been elected a justice of the peace in and for Troy township, Perry county, was, by the Governor's commission, dated the 17th day of April, 1882, "commissioned as such justice of the peace for the term of four years from the 17th day of April, 1882." He accepted the office, and on the 28th day of April, 1882, qualified, and acted as such justice thereafter. In 1884, appellant was elected and qualified as trustee of the township. At the township election, on the 5th day of April, 1886, appellant and Marks were rival candidates for the office of trustee of the township. Appellant received 455 and Marks 537 votes. The inspectors of the election issued to Marks a cer-

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tificate of election on the 6th day of April. On the 17th day of that month he filed his bond, qualified and demanded from appellant the books, papers, etc., belonging to the office. On the 12th day of the same month, appellant took the oath of office, and filed a bond, which was not approved by the auditor because of the certificate of election being held by Marks. Claiming that Marks was ineligible to the office of trustee by reason of being a justice of the peace, appellant refused to surrender the office to him.

The Constitution provides that no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office. R. S. 1881, section 176. That the office of justice of the peace is a judicial office under our Constitution and statutes, is well settled.

It was held in the case of *Smith v. Moore*, 90 Ind. 294, that a judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term; in other words, that the disability imposed by the Constitution has reference to the taking and holding of the office, and not to the election. That case has been followed and approved in subsequent cases.

Marks was eligible to take and hold the office of township trustee, if the term began after the expiration of his term as justice of the peace, although such term may not have expired at the time of the election.

The two material and controlling inquiries are, when did Marks' term as justice of the peace expire, and when did the term of township trustee begin? The record shows nothing as to the beginning of Marks' term as justice of the peace, except what is shown by his commission from the Governor. That commission, as we have seen, fixed his term at four years from the 17th day of April, 1882. If the 17th day of April was a part of the term, the term ended at midnight of the 16th day of April, 1886. If the 17th is to be excluded, the

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term ended at midnight of the 17th day of April, 1886. *Wells v. Wells*, 6 Ind. 447.

The general rule may be said to be, that when time is to be computed from a day upon which an act is done, that day will be excluded. *Hathaway v. Hathaway*, 2 Ind. 513; *Swift v. Tousey*, 5 Ind. 196; *Womack v. McAhren*, 9 Ind. 6; *Martin v. Reed*, 9 Ind. 180; *Blair v. Davis*, 9 Ind. 236. See, also, *Hill v. Pressley*, 96 Ind. 447; *Benson v. Adams*, 69 Ind. 353 (35 Am. R. 220); *Best v. Polk*, 18 Wall. 112.

There is a section of the code which provides that "the time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last." R. S. 1881, section 1280. *Faure v. United States Ex. Co.*, 23 Ind. 48; *Noble v. Murphy*, 27 Ind. 502; *State, ex rel., v. Thorn*, 28 Ind. 306; *Byers v. Hickman*, 36 Ind. 359.

The above section of the statute evidently has reference to matters properly falling within the code of civil procedure and not to matters in no way connected therewith, although some of the cases seem to give it a broader application. See *Towell v. Hollweg*, 81 Ind. 154.

It must be apparent that the above section of the code has no application to the office of justice of the peace. Neither the office, nor anything relating to it, is provided for in the code. The circumstances and reason of particular cases may be such as to require that they shall not be governed by the general rule as above stated. The terms of a contract may be such as to require a departure from that rule in the computation of time. *Cook v. Gray*, 6 Ind. 335; *Brown v. Buzan*, 24 Ind. 194; *Newby v. Rogers*, 40 Ind. 9.

In the case last above, it was held that where property is contracted to be delivered from the 15th to the 28th of a specified month, both the 15th and 28th are to be excluded. See, also, *Fox v. Allensville, etc., T. P. Co.*, 46 Ind. 31, where it was held that in giving notice thirty days previous to the time when payments were to be made on gravel road assessments, the first day of publication should be counted. See,

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also, *Hill v. Pressley*, 96 Ind. 447, where a like ruling was made in relation to a published notice of a sheriff's sale.

In the case of *Tucker v. White*, 19 Ind. 253, it was held that in determining the expiration of the stay of execution "from the time of signing the judgment," the day on which the judgment was signed should be counted, because execution might have been issued on that day but for the entering of replevin bail. That was a case "where the reason of the thing," as stated in the case of *Cook v. Gray*, *supra*, controlled.

In the case before us, it is shown that Marks was commissioned as justice of the peace for a term of four years from the 17th day of April, 1882. Under that commission, without doubt, he might have qualified on the 17th day of April, and exercised the functions of his office. He did not qualify on that day, but his delay did not postpone the beginning of his term of office. Nor does it make any difference that the commission was not issued until the 17th day of April. There may have been delay through the neglect of the Governor, or some of the election officers, but such delay did not, in this case, affect the beginning of Marks' term.

By the terms of the commission, which, as we have seen, is all the evidence we have of the beginning of his term, that term was for four years from the 17th day of April, 1882, whether he received the commission on that day or not. Whether or not he did receive it on that day, is not shown by the record. Being quite convinced that under the authority of his commission, Marks might have qualified and discharged the functions of his office of justice of the peace on the 17th day of April, 1882, we are constrained to hold that his term of office began on that day, and that that day must be counted as a part of his term. And as, in such a case, the law does not recognize a fraction of a day, it follows from the above ruling that his term as such justice of the peace expired at midnight of the 16th day of April, 1886.

This brings us to the other question, viz.: When did the term of office of township trustee begin in 1886?

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The statute provides, that the election of township trustees shall be held on the first Monday of April. The first Monday of April, 1886, was the 5th day of the month, and on that day the election was held. It is also provided, that on the day following the election, the inspectors shall make out and deliver to the successful candidate a certificate of election. It is further provided, that such certificate shall entitle the holder to qualify and enter upon the discharge of the duties of the office at the expiration of ten days from the day of such election. R. S. 1881, sections 4735, 4736, 4737.

In this case, the general rule above stated applies, and in computing the time, the day of election is to be excluded. This is manifestly so, because the day is taken up with the election. Ten days from the day of the election, therefore, expired with midnight of the 15th day of April, 1886.

On the 16th day of April, the eligible and elected trustee, was entitled to enter upon and discharge the duties of the office. That day, therefore, was properly the beginning of the new term. No other reasonable construction can be given to the above section, 4737.

By the section of the Constitution under consideration, a person elected to a judicial office is ineligible to an office other than judicial, the term of which begins before the expiration of the term of the judicial office. Such is the effect of the ruling in the case of *Smith v. Moore*, 90 Ind. 294, and the cases there cited, and such is the reasonable construction of the constitutional provision.

It results, therefore, that as Marks' term as justice of the peace had not expired on the 16th day of April, 1886, at which time the term of township trustee began, he was ineligible to that office. The votes cast for him, therefore, can not be counted against appellant, who was eligible. *State, ex rel., v. Johnson*, 130 Ind. 489. As appellant received the next highest number of votes, he was properly elected, and was, and is, entitled to the office.

Appellee's counsel cite us to section 5527, R. S. 1881, which

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provides that if any officer, of whom an official bond is required, shall fail within ten days after the commencement of his term of office, and the receipt of his commission or certificate, to give bond in the manner provided by law, the office shall be vacant. This section does not fix the beginning of the term of any office. It provides for a forfeiture of offices, the terms of which have begun. An elected officer may delay the filing of his bond for ten days after the commencement of his term of office, and, under some circumstances, for a longer time, but such delay does not change the beginning of the term of office.

Marks did not receive his certificate of election until the 8th day of April, although it was issued on the 6th, and did not file his bond until the 17th day of April, but such delay did not postpone nor change the beginning of the term of the office of township trustee. He could not take the office on the 17th, because he was ineligible on the 16th, when the term began.

As the court below found against appellant, and rendered judgment ousting him from the office, the judgment must be reversed.

Judgment reversed, and cause remanded, with instructions to the court below to grant appellant's motion for a new trial, and to proceed in accordance with this opinion.

Filed Sept. 14, 1886; petition for a rehearing overruled Nov. 17, 1886.

No. 12,623.

WOOLERY, ADMINISTRATOR, v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

NEGLIGENCE.—*Railroad.—Freight Train Passengers.—Assumption of Risks.—Care Required of Company.—Presumption.*—When a person becomes a passenger on a freight train, he assumes the risks necessarily and reasonably incident to being carried by that method; but it is the duty of

107	381
134	381
107	381
139	278
107	381
146	153
146	440
107	381
151	602
107	381
166	702

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the railway company to exercise the highest degree of care for the safety of such passengers, consistent with the usual and practical operation of freight trains, and the same presumptions arise in favor of a passenger who is injured while submitting to the regulations of the company as in the case of a passenger on any other train.

SAME.—*Jumping from Train to Escape Apprehended Danger.—Contributory Negligence.*—If one, induced by groundless fear, leaps from a car while the train is in rapid motion and is killed, when there is no reasonable cause to apprehend danger to life or limb, then, even though the railroad company is guilty of negligence in loading a lumber car, which, by reason of the lumber falling off and striking the car occupied by the passenger, causes the latter's alarm, there can be no recovery.

SAME.—*When there May be a Recovery.*—It is only where, by the negligence or misconduct of another, one is put to the choice of adopting the alternative of an attempt to escape, or of remaining under an apparently well grounded apprehension of serious personal injury, that there can be a recovery for an injury received in pursuing the former course.

SAME.—*Instruction.—Duty of Court.*—It is the duty of the court to instruct the jury as to what facts, within the issues in the case, if established by proof, will or may, under the circumstances, constitute contributory negligence, leaving to the jury the duty of discovering whether such facts and circumstances are proved.

INSTRUCTION TO JURY.—*When Erroneous Instruction not Available for Reversal of Judgment.*—A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that the instruction complained of was not influential in inducing the verdict.

From the Washington Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellant.

MITCHELL, J.—This was an action by the administrator of Andrew H. Woolery, deceased, against the railway company above named, to recover damages for the benefit of the widow and children of the deceased, for negligently causing the intestate's death.

The complaint was in four paragraphs. In each paragraph it is charged that the deceased was a passenger on one of the defendant's freight trains, going from Bloomington to Harrodsburg, in Monroe county. While being so carried, it is alleged that the lumber on a flat car immediately preceding the caboose, in which the decedent was seated, became loose,

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and fell off in confusion, and that the deceased jumped or was thrown from the caboose and killed.

The first paragraph charges negligence against the company, in that the lumber on the flat car was improperly loaded and insecurely stayed.

The second charges that the lumber car was improperly loaded, and that the train was run at an immoderate and dangerous rate of speed.

The third paragraph charges that the car was unskilfully and negligently loaded, and that the train was recklessly, negligently and dangerously run.

The fourth charges that the car was loaded in a wilfully reckless and dangerous manner, and that the train was run with wilful, reckless and gross negligence.

Upon an issue made by the general denial, the case has been twice tried at *nisi prius*, resulting in a verdict each time in favor of the defendant.

The evidence in the record tends to show that the deceased was a man in vigorous health, about forty-eight years old. That he went as a passenger on one of the defendant's freight trains, and for a time occupied a seat provided for passengers, after which he stood by the door at the side of the car, supporting himself by holding to an iron rod which ran horizontally with the top of the door. While in that position, the train running fourteen or fifteen miles an hour, the stakes and fastenings, which held the lumber on a flat car immediately in advance of the caboose, gave way, and part of the lumber fell off. Some of it was strewn along the track, and some came against the caboose, making considerable noise and creating some confusion. Neither the caboose nor any of the cars left the track. No injury was done to the caboose, except that some of the lumber in falling broke one of the windows, and one of the door hinges was broken. The passengers seated in the caboose, of whom there were several, sustained no injury. The deceased jumped out of the open

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door near which he was standing, and was found dead when the train was stopped.

In answer to special interrogatories, returned with their general verdict, the jury found that the freight train was run at the rate of speed at which such trains are usually run, but that the lumber car was not loaded and fastened in the ordinary secure way for loading and fastening lumber cars.

They also returned that there was not sufficient cause for alarm at the time the deceased jumped from the caboose, to cause a prudent man similarly situated to make such a jump.

They returned, furthermore, that it was an act of imprudence for the deceased to stand in the door of the caboose while the train was running in the manner described.

It thus appears that while the jury found the defendant guilty of negligence in improperly loading the lumber car, their verdict in its behalf was predicated on the fact that the decedent had been guilty of contributory negligence, which resulted in his death.

At the proper time the court instructed the jury as to the facts necessary to be proved in order to render the defendant liable under each of the several paragraphs of the complaint. The facts imputing negligence to the defendant, as stated in each paragraph of the complaint, were repeated in substance in separate instructions, and the jury were told that in order to warrant a finding for the plaintiff under the particular paragraph to which the instruction applied, the facts therein recited must have been substantially proved.

It is now urged that these instructions were erroneous, in that they required the plaintiff to prove more than was necessary in each case, in order to establish the defendant's negligence. However this may be, since it affirmatively appears from the answers to special interrogatories, that the jury found the defendant guilty of negligence, and that their verdict in its favor was the result of finding the decedent guilty of contributory negligence, it is certain that the instructions, in reference to this feature of the case, were not prejudicial to

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the plaintiff. "A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that the instruction complained of was not influential in inducing the verdict." *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264. *Barnett v. State*, 100 Ind. 171.

In so far as the instructions complained of informed the jury that it was necessary for the plaintiff to prove by a preponderance of the evidence, that the lumber car was improperly or negligently loaded, they were not in all respects accurate. If the falling lumber had occasioned the death of the intestate, without his fault, while he was being carried as a passenger, the mere fact that it fell from the car would have raised such a presumption of negligence against the defendant as would have called upon it for explanation. *Cleveland, etc., R. R. Co. v. Newell, supra*, and cases cited:

Where a person becomes a passenger on a freight train, he assumes the risks and inconvenience necessarily and reasonably incident to being carried by the method which he voluntarily chooses. It is, however, the duty of the railway company, when it undertakes to carry passengers on freight trains, to exercise the highest degree of care for their safety, consistent with the usual and practical operation of such trains, and it is responsible for any negligence which results in injury to a passenger, while being so carried. The same presumptions arise in favor of a passenger, who is injured on a freight train while passively submitting to the regulations of the company, in respect to such trains, as in the case of a passenger on any other train.

Upon the subject of contributory negligence, the court instructed the jury, in substance, that if the deceased jumped from the car, while the train was running at the rate of fourteen or fifteen miles an hour, he was guilty of such contributory negligence as would defeat a recovery, unless, at the time, the circumstances were such as reasonably to have in-

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duced a man of ordinary prudence to believe that his life was in danger, or that he was in danger of suffering great bodily harm, so that he was impelled to leap from the car in order to escape reasonably apprehended danger.

It is said, in criticism of the instructions on that subject, that the question of contributory negligence was a question of fact to be determined by the jury.

It was the exclusive province of the jury to ascertain the facts, and apply them when ascertained to the law, and return their general verdict accordingly. In doing this, however, they were to be guided by proper instructions from the court as to the law of the case. In that connection it was the duty of the court to instruct the jury what facts within the issues in the case, if established by the proof, would or might, under the circumstances, constitute contributory negligence, leaving to the jury the duty of discovering whether such facts and circumstances were proved or not. Simply to have told the jury that the plaintiff must have been free from contributory negligence, without stating what facts might constitute contributory negligence, would have been to leave the jury without any direction whatever in respect to the legal effect of the facts in the case. The practical result of the doctrine contended for would be to submit both the law and the facts to the determination of the jury.

It can not be maintained that a civil case can arise in which the court is incompetent to declare the law upon the facts, when the facts are either admitted or satisfactorily proved. Where the essential facts are ascertained in any case, the litigants have a right to call upon the court to declare the law. *Wannamaker v. Burke*, 111 Pa. St. 423.

If the court can do nothing more than deal in abstract generalities in its charge, then in every case involving negligence the jury are left at sea, a law unto themselves. It is the duty of the court, in every case in which a general verdict is to be returned, to instruct the jury as to the force and legal effect of the facts which may have been proved within the issues.

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Conner v. Citizens St. R. W. Co., 105 Ind. 62, and cases cited; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508); *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Bruker v. Town of Covington*, 69 Ind. 33 (35 Am. R. 202); *Zimmerman v. Hannibal, etc., R. R. Co.*, 71 Mo. 476 (S. C., 2 Am. & Eng. R. R. Cases, 191); *Railroad Co. v. Depew*, 40 Ohio St. 121.

It may be true that a particular act can not always be designated as negligent or otherwise until the surrounding circumstances which may have governed and controlled the actor are satisfactorily established. When, however, the act and all the surrounding facts and circumstances are beyond dispute, the court must declare the law one way or the other upon the facts. *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185, 192.

If the plaintiff's intestate, induced by groundless fear, leaped from the car when there was no reasonable cause to apprehend danger to life or limb, then, even though the railroad company was guilty of negligence in loading the lumber car, its negligence did not proximately cause the intestate's death, and no recovery could have been had. Railroads are not responsible for the rashness or folly of passengers. *Jeffersonville, etc., R. R. Co. v. Swift*, 26 Ind. 459, 476; *Railroad Co. v. Aspell*, 23 Pa. St. 147.

When, by the negligence or misconduct of one, another is suddenly put in peril, if the person so imperiled, while under the impulse of an apparently well grounded fear, seeks to escape, and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensued, provided that in attempting to make his escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances. The inquiry in such a case always is, did the negligence of the defendant put the injured person to the choice of adopting the alternative of an attempt to

Woolery, Adm'r, v. The Louisville, New Albany and Chicago Railway Co.

escape, or to remain under an apparently well grounded apprehension of serious personal injury? Did he act with ordinary prudence, considering all the circumstances which surrounded him, or was his injury the result of a rash apprehension of danger which did not exist?

If a man, wrongfully menaced with a switch, should purposely leap over a dangerous precipice in order to escape a possible stroke, it would hardly be claimed that he could recover for an injury caused by the leap. So, if the intestate voluntarily leaped from a train, while it was moving at a rate of speed which made death or great bodily harm inevitable, he was guilty of negligence arising to the degree of rashness, unless the falling lumber produced such a condition of things as reasonably to have induced in his mind the belief that to remain would result in great bodily harm. *Jones v. Boyce*, 1 Stark. 402; *Stokes v. Saltonstall*, 13 Peters, 181; *Card v. Ellsworth*, 65 Maine, 547 (20 Am. R. 722); *Sears v. Dennis*, 105 Mass. 310; *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278 (37 Am. R. 410); *Buel v. New York Central R. R. Co.*, 31 N. Y. 314; *Pittsburgh City v. Grier*, 22 Pa. St. 54; *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143.

The instructions relating to the subject of contributory negligence were in consonance with the principles above stated. They were therefore not erroneous.

What has been said disposes of all the questions made upon the subject of instructions, those relating to the amount of proof required to establish the defendant's negligence being, as we have before seen, disposed of by the finding of the jury of such facts as affirmatively show that the decedent was negligent.

Some question is made in respect to rulings of the court in excluding evidence offered by the plaintiff below. The evidence, the exclusion of which is complained of, was not admissible, but whether it was or not, the manner in which the question is sought to be presented is directly within the

Hays v. Peck.

ruling in *Higham v. Vanosdol*, 101 Ind. 160, and *Judy v. Citizen*, 101 Ind. 18, and is therefore not presented in such manner as to require further consideration.

The judgment is affirmed, with costs.

Filed Sept. 17, 1886.

No. 12,694.

HAYS v. PECK.

DEED.—Consideration.—Parol Evidence of.—Agreement of Grantee to Pay Encumbrance.—Where the consideration of a deed is stated in general terms, the true consideration may be shown by parol, and for this purpose it may be shown that the grantee verbally agreed, as a part of the consideration, to pay an existing encumbrance.

From the Blackford Circuit Court.

J. Cantwell, S. W. Cantwell and R. S. Gregory, for appellant.
W. A. Bonham and J. A. Bonham, for appellee.

ELLIOTT, J.—The appellant's complaint alleges that the appellee executed to her a deed with full covenants of warranty; that these covenants were broken by a lien on the land conveyed, created by an assessment for the construction of a ditch, on which assessment the land was sold.

The appellee was permitted to prove by parol, that as part of the consideration for the conveyance of the land, the grantee undertook to pay the assessment. The ruling of the court in permitting this evidence to be introduced is vigorously assailed, but, in our opinion, the assault is not a successful one. It is settled by our decisions that the consideration of a deed may be shown by parol evidence, and that, for this purpose, it may be shown that the grantee verbally agreed, as part of the consideration, to pay an existing encumbrance. *Allen v. Lee*, 1 Ind. 58; *Pitman v. Conner*, 27 Ind. 337; *Robinius v. Lister*, 30 Ind. 142; *Carver v. Louthain*, 38 Ind.

107	389
128	389
107	389
143	616
107	389
144	162
107	389
150	389

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530; *McDill v. Gunn*, 43 Ind. 315. The doctrine of *Chapman v. Long*, 10 Ind. 465, in conflict with that declared in the cases we have cited, has been repeatedly disapproved, and the case itself expressly overruled. *Pea v. Pea*, 35 Ind. 387, see p. 397; *Harvey v. Million*, 67 Ind. 90.

It is an elementary doctrine that the consideration of a deed may be shown by parol, and it is impossible to give effect to this doctrine without permitting the parties to prove what agreement as to the consideration preceded the execution of the deed. The agreement as to the consideration necessarily precedes the execution of the deed, and the fact that the consideration was agreed upon some time prior to the delivery of the deed does not preclude the grantor from showing what constituted the consideration of the deed. To hold otherwise would be to run counter to the rudimentary doctrine that it is always competent to prove the actual consideration yielded for the conveyance of land. With few exceptions the rule is, that the preliminary negotiations are merged in the deed. *Ice v. Ball*, 102 Ind. 42. This doctrine, however, does not apply to the consideration, except, perhaps, where the deed specifically sets forth the consideration. Where, however, the consideration is merely stated in general terms, the doctrine does not apply. The case of *Ice v. Ball*, *supra*, is not to be considered as deciding that where the deed states the consideration in general terms, the grantee is precluded from proving the true consideration, even though it may have been agreed upon prior to the execution of the deed. It is, of course, necessary to show that the consideration previously agreed upon was the one on which the deed was founded.

Judgment affirmed.

Filed Sept. 17, 1886.

Watts v. Fletcher *et al.*

No. 12,092.

WATTS v. FLETCHER ET AL.

107	391
159	584

PLEADING.—*Written Instrument.*—*Exhibit.*—It is only where a pleading is founded on a written instrument that the original or a copy must be filed with the pleading.

107	391
169	525

PROMISSORY NOTE.—*Assignment.*—*Defences.*—*Notice.*—*Deed.*—*Covenant Against Encumbrances.*—In a suit by the assignee of a non-commercial note, executed in consideration of the conveyance of real estate by warranty deed, an answer by the defendant that he had been compelled to pay an encumbrance on the land, and asking that the amount might be allowed against any sum due on the note, is good, without negating notice on his part of the encumbrance when he took his deed, or charging the plaintiff with notice of the defence when the note was assigned to him.

From the Marion Superior Court.

R. Denny, for appellant.

L. Jordan, for appellees.

MITCHELL, J.—On the 10th day of August, 1874, John H. Wiley sold certain real estate in Marion county to George G. Turley. As security for the unpaid purchase-money, Turley delivered to Wiley his three promissory notes for \$666.66 each, falling due, respectively, December 25th, 1875, 1876 and 1877. Collateral to the notes, Turley and wife executed a mortgage on the land sold.

The first note of the series seems to have been paid. About this there was no dispute. The second was assigned to Fletcher & Co., and the third to the appellant, Thomas E. Watts.

Fletcher & Co. commenced suit against Turley and wife, making Watts, the holder of the third note, a party defendant. Watts filed a cross complaint, in which he set up the note held by him, and a copy of the mortgage. He asked a personal judgment against Turley, and for the foreclosure of his mortgage lien. Subsequently, Fletcher & Co. abandoned all claim to relief of any kind on the note held by them, and the case progressed to judgment in favor of the appellee

Watts v. Fletcher et al.

Turley, on the issues made on the cross complaint and the answers thereto.

The first subject of discussion by appellant is the ruling of the court in overruling a demurrer to the third and fourth paragraphs of the answer to his cross complaint.

The substance of these answers is, that while the note sued on was held by Wiley, the cross complainant's assignor, the defendant Turley transferred to him a note against one Jennings, amounting to \$866.11, the proceeds of which, when collected, were to be applied in liquidation of the note sued on. In one paragraph it is charged that Wiley collected on the Jennings note the sum of \$900, which amount it is asked may be set off against any sum which may be found due on the note in suit. In the other paragraph it is charged that the amount of the Jennings note was lost by the negligence of Wiley in failing to use diligence in collecting it.

It is urged as an objection against both of these paragraphs, that a copy of the note alleged to have been transferred to Wiley is not set out with the answers. The argument is that the defences pleaded had their foundation on the note, and that within the provisions of section 362, R. S. 1881, a copy must have been filed. The note against Jennings, which is alleged to have been transferred by Turley to Wiley, is in no sense the foundation of the appellees' defence. *Locke v. Merchants Nat'l Bank*, 66 Ind. 353.

One paragraph of the answer was founded upon the fact that the appellant's assignor had received on the Jennings note, which had been transferred to him, a sum of money presumably sufficient to satisfy the note sued on. The other proceeded upon the theory that the appellant's assignor was chargeable with the amount of the Jennings note because of his negligent failure to collect it. Both defences rested upon an agreement in parol, which was entirely collateral to the note. Whether any other valid objection could have been made to either of the foregoing paragraphs we do not inquire.

It certainly is no sufficient objection that they do not set out a copy of the Jennings note.

The fifth paragraph of answer set up as a partial defence, that the consideration of the note in suit was certain real estate purchased and conveyed by deed of general warranty from Wiley to the defendant Turley. It was averred that there was an encumbrance upon the land at the time the conveyance was made, which Turley has been compelled to pay, at a cost of \$800, which sum he asked might be allowed against any sum remaining due on the note.

Without stopping to state the specific objections urged against the sufficiency of this paragraph, it is sufficient to say it was not necessary, as is claimed by the appellant, that the answer should have contained an averment that the defendant did not have notice of the encumbrance at the time he took his deed, or that it should have been charged that the appellant had notice of the alleged defence at the time the note sued on was assigned to him. The note was not commercial paper, and even if it had been, as it was long past due when it was assigned, it was subject to the same defences in the hands of the assignee, without notice, as it would have been in the hands of the original payee. *Henry v. Gilliland*, 103 Ind. 177.

The covenant against encumbrances, contained in Turley's deed, was available as a defence, even though at the time he took the deed he had knowledge of the mortgage, which he was subsequently compelled to pay. Notice of an encumbrance does not affect the right of a grantee to recover for the breach of an express covenant against encumbrances. *Burk v. Hill*, 48 Ind. 52 (17 Am. R., 731). There was no error in the rulings upon the pleadings.

Finally, it is argued, that the evidence does not support the finding, and that for that reason error intervened in overruling the appellant's motion for a new trial.

Upon the theory of the evidence, or the facts established, as assumed by counsel for appellant, we agree that the calcu-

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lations made, and the conclusions drawn, make a plausible case in his favor. Conceding all this, it is nevertheless not even claimed that if the appellees' theory of the case, as presented by the evidence, should be accepted, the finding is not supported by the evidence.

As, under the often repeated rule, we can not weigh the evidence and decide between conflicting theories, the judgment must be affirmed, with costs.

Filed June 26, 1886; petition for a rehearing overruled Nov. 17, 1886.

107	394
124	168
135	257

107	394
125	85
139	565

 No. 12,663.

MCLEAD ET UX. v. THE ÆTNA LIFE INSURANCE COMPANY.

PLEADING.—*Answer*.—*Demurrer*.—An answer must respond to the entire complaint, or to so much as it purports to answer, or it will be bad on demurrer for the want of facts.

HUSBAND AND WIFE.—*Executory Contracts of Wife*.—*Real Estate*.—Under sections 5117 and 5119, R. S. 1881, a married woman can not convey or mortgage her real estate, nor enter into any executory contract to do so, unless her husband joins therein, nor can she enter into any contract of suretyship; but, except as thus prohibited, she has the same power to make executory contracts, and is as much bound thereby, as if she were unmarried.

SAME.—*Mortgage*.—*Foreclosure*.—*Consideration*.—*Complaint*.—Where it does not appear from the complaint to foreclose a mortgage against a husband and wife, that the mortgaged real estate is the separate property of the wife, or that she is the surety of her husband, such complaint is good without an averment that she received the consideration, or a part of it, of the notes and mortgage, either in person or in benefit to her estate.

SAME.—*Mortgage of Land Held by Entireties*.—*Validity*.—*Suretyship*.—A mortgage executed by a husband and wife on land held by them as tenants by the entirety, if it is for the benefit of the common property, or to secure the individual debt of the wife, is valid and binding on both. It is only where it is given to secure the husband's debt—the wife being

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prohibited from entering into a contract of suretyship by section 5119—that it is void.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellants.

T. J. Kane and *T. P. Davis*, for appellee.

Howk, C. J.—This was a suit by the appellee to foreclose a mortgage, executed to it by the appellants, on certain real estate in Hamilton county, and to collect the debt secured thereby, evidenced by the joint notes of such appellants. The appellants jointly answered in a single special paragraph, and the appellant Malinda McLead separately answered in a single affirmative paragraph. To each of these answers, appellee's demurrer was sustained by the court. And the appellants declining to amend or plead further, judgment was rendered against them for the amount due on their notes, and a decree was entered for the foreclosure of the mortgage in suit, etc.

In this court the appellants jointly, and appellant Malinda separately, assigned as errors the sustaining of appellee's demurrers to their respective answers, and, further, that the complaint herein does not state facts sufficient to constitute a cause of action, and that the demurrers to their answers should have been carried back by the court and sustained to appellee's complaint.

We will consider first appellants' objections to the sufficiency of appellee's complaint. There was no demurrer to the complaint, and its sufficiency is called in question for the first time in this court. It is claimed that "appellee's complaint does not state facts sufficient to constitute a cause of action against appellants jointly, or against the appellant Malinda McLead separately," because it fails to allege that appellant Malinda received either in person, or in benefit to her estate, the consideration of the notes and mortgage sued upon, or any part thereof. The notes and mortgage were jointly executed by the appellants on the 18th day of No-

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venber, 1882, at which time the act of April 16th, 1881, "concerning husband and wife," which took effect on September 19th, 1881, was a part of the law of this State. In section 1 of such act, section 5115, R. S. 1881, it is provided as follows: "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." In *Arnold v. Engleman*, 103 Ind. 512, after quoting section 5115 as above, the court said: "This confers a general power to make executory contracts except such as are prohibited by the statute." *Rosa v. Prather*, 103 Ind. 191; *Barnett v. Harshbarger*, 105 Ind. 410.

In section 5117, R. S. 1881, it is provided that a married woman "shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage." Section 5119, R. S. 1881, reads as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

Except as prohibited in these two sections, 5117 and 5119, as above, a married woman had and has the same power to make executory contracts, and was and is as much bound thereby, as if she had been or was unmarried at the time of their execution. If the appellee's complaint, in the case in hand, had shown that the appellant Malinda was the surety of her co-appellant in the notes in suit, or that the mortgaged real estate was her separate estate, it would have been necessary, perhaps, to have alleged the further fact, in order to state a cause of action against her, that she had received either in person or in benefit to her estate the consideration of such notes and mortgage, or some part thereof. *Vogel v. Leichner*, 102 Ind. 55. But as no such showing was made in the complaint, it was sufficient to withstand appellants' assignments of errors, and would have been good, we think, even upon demurrers for the alleged want of facts.

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In their joint answer the appellants alleged that they were husband and wife, and, as such, owned jointly as tenants by entireties the real estate described in the mortgage in suit, before and at the time of, and ever since, the execution of such mortgage; and that such mortgage was a cloud upon appellants' title to such real estate. Wherefore they asked that such mortgage be declared null and void, etc.

We are of opinion that the court committed no error in sustaining the demurrer to this joint answer of the appellants. The answer was bad on demurrer, because, while it purported on its face to be an answer to the entire complaint, it responded only as to the mortgage, and was wholly silent as to the notes in suit. The rule of pleading under the code, which requires that an answer must respond to the entire complaint, or to so much thereof as it purports to answer, or that it will be held bad on demurrer for the want of facts, is well settled by our decisions. *Smith v. Little*, 67 Ind. 549; *Douch v. Bliss*, 80 Ind. 316; *McCaslin v. State, ex rel.*, 99 Ind. 428, on p. 441.

The answer manifestly proceeds upon the theory that the mortgage was null and void, because the appellants, as tenants by the entirety of the mortgaged real estate, could not execute a valid mortgage thereon in any event or for any purpose. This theory is erroneous. A mortgage executed by both the tenants by the entirety would have been valid and binding on each of them, we think, under the rules of the common law. In *Dodge v. Kinzy*, 101 Ind. 102, we held such a mortgage to be invalid and void, because it appeared that the mortgage was given to secure the husband's debt, and the wife was prohibited by the statute from entering into a contract of suretyship. Section 5119, *supra*. But if such a mortgage were executed for the benefit of the common property, or to secure the individual debt of the wife, we know of no reason why it should not be held valid and binding on both the tenants by the entirety. It is not claimed by appellants in their joint answer, that the mortgage in suit

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was given to secure the husband's debt; nor, indeed, do they show therein the consideration of the notes in suit. The facts stated in such joint answer are not sufficient, we think, to show that the mortgage in suit is null and void, and therefore it must be held that the demurrer to such answer was correctly sustained.

In her separate answer, the appellant Malinda McLead alleged that her co-appellant was her husband; that the mortgaged real estate was at the time, and had been since, the joint property of both appellants; that such real estate was conveyed to appellants as husband and wife, and was owned by them jointly as tenants by the entirety; and that the mortgage in suit was a cloud upon their title to such real estate, and deteriorated its value. Wherefore, etc.

There was no error, we think, in sustaining the demurrer to this answer. It was open to the same objections, and was bad for the same reasons, as the joint answer of the appellants. It was addressed to the entire complaint, but was wholly silent as to the notes in suit. It was not enough for the answer to show that she, Malinda, was a joint owner of the mortgaged real estate; but it should have shown also that the debt secured by the mortgage was the debt of her husband. *Cupp v. Campbell*, 103 Ind. 213, on p. 217.

The judgment is affirmed, with costs.

Filed Sept. 17, 1886.

No. 12,588.

JUDP v. SMALL.

PLEADING.—*Amendment After Finding.*—*When not Available for Reversal.*—

Where it does not appear that the defendant was prejudiced by the amendment of the complaint after the finding was announced, the judgment will not be reversed.

PROMISSORY NOTE.—*Contribution.*—Where one of two joint makers pays a

107	303
124	334
107	350
135	335

Judd v. Small.

note, he may maintain an action against his co-obligor for the amount which the latter ought to have paid.

EVIDENCE.—*Admission of Incompetent Parol Evidence Without Objection.*—

Where parol evidence is admitted without objection, it will sustain a finding, although it would have been held incompetent, as not the best available evidence, if objection had been made.

From the Madison Circuit Court.

W. R. Pierse, C. B. Gerard, R. Lake and W. A. Kittinger,
for appellant.

C. L. Henry, H. C. Ryan and A. A. Small, for appellee.

ELLIOTT, J.—After the case had been closed and the trial court had partially announced its finding, the plaintiff asked leave to amend one of the items in the second paragraph of his complaint, and, as the bill of exceptions recites, leave was granted to amend his pleading so as to make it “correspond with the proof.” The defendant made no offer to show that he was misled or prejudiced by the amendment, but did nothing more than except to the ruling of the court. Our decisions establish the rule that where it does not appear that the defendant was prejudiced by the amendment, the judgment will not be reversed, although the amendment was not made until after the court had announced its finding. *Hay v. State, ex rel.*, 58 Ind. 337; *Durham v. Fechheimer*, 67 Ind. 35; *Leib v. Butterick*, 68 Ind. 199; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546.

The appellee testified that he paid a note on which he and the appellant were jointly liable, and this was sufficient to entitle him to a recovery of the amount for which the appellant was liable. It is a well established rule that where one of two joint makers pays a note, he may have his action for the amount which his co-obligor ought in law and equity to have paid.

It is true that the note which the appellee paid constituted the best evidence, but where parol evidence is admitted without objection, it will sustain a finding or verdict, although it would have been held incompetent if a reasonable objection

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had been made. *Riehl v. Evansville, etc., Ass'n*, 104 Ind. 70; *Stockwell v. State, ex rel.*, 101 Ind. 1.

There is evidence supporting the finding of the court on all material points, and a well known rule prohibits us from disturbing it.

Judgment affirmed.

Filed Sept. 18, 1886.

No. 12,615.

STULTZ v. STULTZ.

107 400
150 325
150 327

HUSBAND AND WIFE.—*Divorce*.—*Alimony*.—*Previous Settlement of Property Upon Wife*.—*Revocation*.—*Evidence*.—Where a husband has settled property upon his wife, and she subsequently applies for a divorce on the ground of his misconduct, but does not insist on alimony, he is not entitled to show the value of the property and the consideration of the settlement, nor, in the event a divorce is granted his wife, can he obtain a revocation.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman, W. A. Branyan, B. M. Cobb, C. W. Watkins, J. B. Kenner and J. I. Dille, for appellant.

B. F. Ibach and J. G. Ibach, for appellee.

MITCHELL, J.—A decree of divorce was given in favor of Mary A. Stultz, in the court below, upon her petition charging that her husband, George W. Stultz, treated her cruelly and inhumanly, and that he was an habitual drunkard.

Alimony was prayed for in the petition, but as no evidence was offered upon the subject of the appellant's property by the petitioner, it is apparent that in respect to that subject the petition was abandoned.

In a pleading denominated an answer, the appellant set up that at the time of his marriage he was possessed of real and

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personal property of the value of \$6,000. He averred further that he was induced by the plaintiff's professions of affection for him to settle upon her real and personal property of the value of \$3,000.

He charged further, that after his wife had obtained the above mentioned property, she abandoned him without cause, and that in order to bring about a reconciliation, and to induce her to return and resume her marital duties with him, he purchased a lot, taking the title in her name, and that thereafter they jointly paid for the erection of a house and improvements thereon, the defendant expending in and about such improvements all his available means. The lots and improvements thus held and produced, are alleged to be of the value of \$9,000.

The answer avers that in making the professions and promises above mentioned, the plaintiff had not acted in good faith; that by means thereof she had artfully secured possession of the defendant's property, and had thereafter, without cause, abandoned him and instituted proceedings for divorce. He asked, in the event a decree of divorce should be granted on the plaintiff's application, that the court would award him a fair and equitable division of the property. Issue was made by a reply in denial.

The plaintiff having offered no evidence in support of her prayer for alimony, the defendant, while testifying as a witness in his own behalf, was asked the following question: "What amount of property did you turn over to your wife, if any? on what condition or consideration, if any, was it done?"

Upon objection being made, the defendant, by counsel, announced that he proposed to prove in answer to the question propounded substantially the facts set up in his answer. The testimony was excluded, and this ruling presents the only question for decision.

The purpose for which the excluded evidence was offered,
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was not to refute the charge of habitual drunkenness, or cruel treatment, although the appellant gave evidence in denial of those charges, but to secure an equitable share of the property previously settled upon the plaintiff, in the event a divorce should be awarded in her favor.

The plaintiff having abandoned any claim for alimony, and there being no demand on her part for the adjustment of any property rights, there was nothing before the court to which the offered evidence was relevant. The only pertinent subject under investigation was, whether the appellant's habits and treatment of the plaintiff were such as entitled her to a divorce.

The evidence offered, and excluded, presents nothing which distinguishes this from the ordinary case in which property has been settled upon a wife by a husband after marriage.

In such a case, upon a divorce being decreed in favor of the wife for misconduct of the husband, if a judgment for alimony is insisted upon by the wife, the amount of property previously settled upon her, and then available for her support, as well as that possessed by the husband, would be proper subjects for consideration in adjusting the sum to be awarded her. *Morse v. Morse*, 25 Ind. 156. In case the husband had previously made a fair and equitable settlement upon his wife, the court would be authorized to consider such settlement in arriving at the additional sum, if any, which would be just and proper under the circumstances to be awarded to the wife. Section 1045, R. S. 1881.

Where a husband is entitled to a decree dissolving the marriage tie on account of the adultery or other gross misconduct of his wife, a state of circumstances might exist in which it would be proper to so allot a settlement of property made by the husband upon the wife, in consideration of marriage, or under other peculiar circumstances, as that the husband would be placed somewhat in the position he would have been in had the union continued. 2 Bishop Mar. and Div., section 509a.

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We are, however, aware of no principle, nor are we cited to any authority, which would justify the revocation of a settlement of property, either in whole or in part, made by a husband upon his wife, in case a divorce was subsequently decreed to the wife on account of the misconduct of the husband. A husband who settles property upon his wife can only make the benefit of such settlement available to himself on condition that the marital union is not destroyed or rendered impossible in consequence of his misconduct. In this way the marriage tie is more closely cemented, and the husband is not awarded a premium for his misconduct by the revocation of a settlement when his wife is in no fault. Assuming that the evidence offered would have sustained the averments of the answer, it could have supplied no foundation for relief to the appellant, unless it had gone to the extent of showing that the charges against the husband were not true. The facts averred do not tend to show that the property was conveyed to the wife under circumstances which affected it with an enforceable trust in favor of her husband. *Moore v. Cottingham*, 90 Ind. 239; *Rose v. Rose*, 93 Ind. 179.

It does not appear but that the purpose of the appellant, in conveying property to his wife, was to invest her with an absolute and irrevocable title. Besides, whatever agreement there was rested in parol. Nothing short of misconduct of the wife, justifying a divorce in favor of her husband, would have authorized an inquiry such as that proposed.

The fact however remains, that a decree was granted to the wife, upon evidence deemed sufficient by the court below, for the misconduct of the appellant. Accepting the conclusion thus reached as being sustained by the proof, it is manifest that the seeming hardship which has resulted to the appellant, is the consequence of his own misdoing.

Concede that the appellant's wife agreed to return and live in conjugal relations with him, in consideration of the conveyance of the property, it can not be further assumed that

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she agreed so to live with him in case he should treat her in a cruel and inhuman manner, or in the event he should become an habitual drunkard; nor can it be assumed that there was an implied agreement, in the event she was compelled by his misconduct to seek a legal separation from him, that she should restore the property, or any part of it.

The judgment is affirmed, with costs.

Filed Sept. 18, 1886.

No. 12,157.

THE CITY OF LAFAYETTE v. WORTMAN.

CITY.—Streets and Alleys.—Change of Established Grade.—Failure to Assess and Tender Damages.—Recovery from City.—Under section 3073, R. S. 1881, a city can not change the grade of a street or alley, which has once been regularly established, without first having the damages which will result to adjacent property-owners assessed and tendered, and where it fails to do this, an action may be maintained against it for the damages.

EVIDENCE.—Title to Real Estate.—Deed.—Where title by deed is relied on, a chain of title must be traced back to the ultimate source of title or to a grantor in possession under a claim of title at the time he executed his deed.

SAME.—Idem Sonans.—Presumption.—The names *Wortman* and *Workman* are not *idem sonans*, and the court will not assume, in the absence of proof, that they refer to the same person.

PLEADING.—General Denial.—Evidence.—An answer in general denial puts the plaintiff to proof of all the material allegations of his complaint.

From the Tippecanoe Superior Court.

W. C. L. Taylor, for appellant.

W. H. Bryan and W. R. Wood, for appellee.

NIBLACK, J.—Action by Daniel P. Wortman against the city of Lafayette, for injury to an alley in which he claimed to have an interest.

The complaint charged that at the time of the injuries com-

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plained of, the plaintiff was, as he still is, the owner in fee simple of lot No. 102, in Perrin's addition to the city of Lafayette; that at the time he became the owner of said lot, there was, and afterwards continued to be, an alley along the northern boundary thereof which had been regularly laid out and dedicated to public use, and which was used by the plaintiff and other adjoining lot-owners as a passage way for vehicles to and from the rear of their respective lots abutting upon said alley, up to the time of committing the injuries herein sued for; that the alley extended from Earl avenue to Thompson avenue within the city limits; that after the dedication of the alley to public use, the common council of the city established the grade thereof in the manner following, viz.: "Beginning at the grade of Earl avenue and running down to Thompson avenue, in the shape of a depressed curve;" that afterwards the appellant, under a set of negligent, unskilful, unmechanical plans and specifications, improved the said alley in the following unskilful, negligent and unworkmanlike manner, viz., by changing the established grade, and by commencing said improvement at a point six feet, more or less, below the established grade, by constructing an open gutter the entire width of said alley, and throughout the entire length thereof upon the grade so changed under the said negligent, unskilful and unmechanical plans and specifications, the said negligent and unskilful improvement beginning at a point where the said alley intersects Earl avenue at the northeast corner of said lot, six feet, more or less, below the established grade of the avenue, and six feet, more or less, below the established grade of the alley, the base line of said improvement being one foot, more or less, below the base line of a brick sewer emptying into the alley at the northeast corner of said lot, and at the west line of Earl avenue, running thence west along the line of said lot with a fall of thirteen inches, more or less, to every ten feet of improvement; that the defendant, through its officers and agents, under the aforesaid unskilful plans and specifications, constructed, and caused to be con-

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structed, a large wooden trough, or water-box, two feet and four inches wide, one foot and ten inches deep, and thirty feet long; and, as part of the aforesaid mentioned improvement of said alley, the said trough, or water-box, through the negligence and unskilfulness of defendant, its officers and agents, has been placed in the said open gutter running along the line of said alley, with one end abutting said brick sewer aforesaid, situate under said Earl avenue and opening out at the northwest corner of plaintiff's property; said box running along the base line of said open gutter six feet, more or less, below the established grade of said alley, and along the line of said lot throughout its entire length; that by reason of said defendant's unskilful and unmechanical plans and specifications for the improvement of said alley in the manner aforesaid, and by further reason of the negligent, unskilful and unworkmanlike manner in the execution of said improvement in the manner aforesaid, ingress and egress once enjoyed by the plaintiff is rendered impossible, and that this alley furnishes the only passage way by which the rear of his said lot could be reached by vehicles in ordinary travel and traffic; that defendant has ever since wrongfully permitted said negligent, unskilful improvement to remain; that before the construction of the negligent and unskilful improvement said property was very valuable, worth at least \$800, and by reason of said wrongful and unskilful improvement, the property has been rendered absolutely worthless; that the appellant never gave, or caused to be given, to plaintiff any notice that said improvement was to be made, and that said defendant has never made, or caused to be made, any assessment of damages for the wrongful, negligent and unskilful improvement to appellee; that by reason of said improvement so constructed, and so permitted to remain, the use of said alley way is destroyed and said lot made worthless.

A demurrer to the complaint was filed and overruled, after which there was a verdict and judgment for the plaintiff.

Counsel for the city, the appellant here, makes the point

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that upon the facts stated the appellee might have enjoined the common council from proceeding with the change of grade, and the improvements complained of, until his damages were assessed and paid, but that having waived his right to so enjoin the common council, his only remaining remedy is a resort to the writ of mandamus to compel the city to have his damages assessed under the statute having relation to the government of cities, citing the cases of *Trustees, etc., v. Mayor, etc.*, 33 N. J. Law R. 13, and *Macy v. City of Indianapolis*, 17 Ind. 267, and that consequently the demurrer to the complaint ought to have been sustained.

In response to the point thus made, it is argued that the complaint was in form, as well as in legal effect, only a demand for consequential damages resulting from the negligent, unskilful and unmechanical manner in which the improvements in question were made, citing the cases of *City of Logansport v. Wright*, 25 Ind. 512, *City of Indianapolis v. Huffer*, 30 Ind. 235, *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135), *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86), *Town of Princeton v. Gieske*, 93 Ind. 102; *City of Crawfordsville v. Bond*, 96 Ind. 236, and other cases bearing on the same general question of the liability of cities for damages caused by negligent and unskilful street improvements.

The non-liability of cities for injuries and inconveniences to the owners of property as a consequence of improvements made upon, and changes in the grade of, their streets and alleys, when the law providing for such improvements and changes has been fairly complied with, continues to be substantially as it was when the case of *Macy v. City of Indianapolis, supra*, was decided, but since that time a clause has been attached to one of the sections of the statute defining the power and duties of cities, in the following words: "*Provided*, That when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured

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or affected by such change, and such damages shall be collected by the city from the party or parties asking such change of grade in the manner provided for the collection of street improvements." R. S. 1881, section 3073. The cities of the State consequently have not now, and since the enactment of this provision have not had, the lawful right to change the grade of a street or alley which has once been regularly established, without first having the damages which will result to adjacent property-holders assessed and tendered. *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *Mattingly v. City of Plymouth*, 100 Ind. 545.

It follows that the change of the established grade of a street or alley by a city, without first having the prospective damages assessed and tendered, has become an unlawful act—an affirmative wrong, or misfeasance—for which damages may be recovered by any party whose property may thereby be injured.

There is some redundancy, as well as uncertainty, in the averments of the complaint in this cause as it comes to us in the record, and, in consequence, we find some difficulty in putting a satisfactory construction upon it; but giving effect to what impresses us as constituting its controlling averments, we regard the *gravamen* of the complaint to be a charge that the appellant changed the established grade of the alley therein described, to the injury of the appellee's lot, without first causing the damages likely to accrue to be assessed and tendered. Conceding the established grade of the alley to have been so changed, whether the change was skilfully or unskilfully made, became a subordinate question, since the only remaining inquiry was as to the nature and extent of the injury thereby inflicted. In this view, therefore, we are carried to the conclusion that the complaint was sufficient upon demurrer.

At the trial a deed from James J. Perrin and wife, bearing date on the 4th day of March, 1881, and purporting to

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convey the lot described in the complaint to the appellee, was read in evidence, but there was no evidence tending to prove that Perrin was in possession of the lot at the time the deed was executed, or that the appellee ever took possession under the deed, or was ever in the possession of the lot. This was a palpable failure of proof of title in the appellee to the lot in question.

Where title by deed is relied upon, a chain of title must be traced back to the ultimate source of title, or to a grantor in possession under a claim of title at the time he executed his deed. *Broker v. Scobey*, 56 Ind. 588; *Steeple v. Downing*, 60 Ind. 478; *Brandenburg v. Seigfried*, 75 Ind. 568; *Start v. Clegg*, 83 Ind. 78.

But it is insisted that the question of the appellee's title was neither the principal nor controlling question at the trial, and that hence the appellee's title was not in issue, and no formal proof of his title was required.

The appellant answered in general denial, and that put the appellee upon proof of all the material allegations of his complaint. The allegation of ownership of the lot described was a very material allegation, since no one but the owner of property, or one having some interest in it, is entitled to maintain an action for an injury to it. In that respect, an action of the class to which this belongs is analogous to, and governed by, the same general principles as an ordinary action of trespass. In order to maintain an action of trespass, the plaintiff must prove possession, either actual or constructive, or possession of a part under a deed to the whole; or if the land is unoccupied, that he has the title. 2 Greenleaf Ev., section 613; 6 Wait Actions and Def. 64; *Evans v. Board of Trustees*, 15 Ind. 319; *Broker v. Scobey*, *supra*; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

It came out in evidence, introduced upon another branch of the case, that the city engineer, in making a final estimate in favor of the contractors who did the work on the alley, which the appellee charged to have been done injuri-

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ously to his interests, assessed the sum of \$165.81 of the gross amount against *Daniel Workman* as the owner of lot No. 102, in Perrin's addition to the city of Lafayette, and it is claimed in argument that this assessment operated as an admission by the appellant that the appellee was the owner of the lot therein described, and dispensed with further proof of title in him. There was, however, no evidence tending to show that in the use of the name *Daniel Workman* the city engineer referred to, or intended to designate, the appellee. As the names *Wortman* and *Workman* are not of the same sound, and are in fact different names, we would not be justified in assuming that the assessment made as above by the city engineer was an assessment against the appellee as the owner of the lot therein described. We are, consequently, not required to decide whether, if the assessment had been plainly against the appellee as the owner of the lot, it would have operated as an admission of title in him as against the appellant.

For the reasons given the verdict was not sustained by sufficient evidence, and hence a new trial ought to have been ordered.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Sept. 21, 1886.

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SPENCER ET AL. v. MCGONAGLE.

PARTITION.—*Question of Title.*—Ordinarily, an action for partition does not present the question of title for adjudication, but the pleadings may be so framed as to present that question.

SAME.—*Pleading.*—*Theory.*—*Specific Facts Control General Averments.*—Where a plaintiff undertakes to set forth the facts which constitute his title, he will fail unless they are sufficient to give title on the theory on which

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the pleading proceeds, as the specific facts will control, and not the general averments.

DESCENT.—*Partition.*—*Sale by Commissioner.*—*Purchase by Widow.*—*Subsequent Marriage.*—*Conveyance to Second Husband.*—*Consideration.*—A widow who purchases at commissioner's sale, under partition proceedings, land of which her husband died seized, takes by purchase, and not by descent; and where, after a second marriage, she conveys to a third person who conveys to her husband, no consideration being paid, and he dies seized of the land, it will go to his heirs, and not to the heirs of the first husband.

DECEDENTS' ESTATES.—*Erroneous Order Vesting Entire Estate in Widow.*—*When Conclusive.*—*Collateral Attack.*—An order of the common pleas court, having jurisdiction, vesting the entire estate of a deceased husband in his widow absolutely, instead of in her in trust for minor children, as required by the statute in force at the time (1 R. S. 1876, p. 411, section 19), while erroneous, was not void, and it will stand as against a collateral attack.

From the Adams Circuit Court.

R. S. Peterson, E. A. Huffman, B. Harrison, W. H. H. Miller and J. B. Elam, for appellants.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellee.

ELLIOTT, J.—The appellants' complaint asserts title to an undivided interest in real estate and prays that a decree of partition be made severing the interests of the owners.

The cross complaint of the appellee asserts title to the whole of the land in controversy, and pleads specially the facts upon which the claim of title is founded. The facts pleaded are, in substance, as follows:

On the 21st day of February, 1856, the real estate in dispute was owned by Calvin S. Dorwin, who died intestate, leaving as his heirs his widow, Jane E. Dorwin, and his children, Cornelius, Hannah, Mary, Milton and Ella; Milton and Ella died unmarried and childless. On the 27th day of March, 1856, the widow, Jane E. Dorwin, filed a petition in the court of common pleas of Adams county, praying an order of partition, and a judgment was entered decreeing that the land was not susceptible of division, and directing its

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sale. A commissioner was appointed by the court to make the sale and he did sell the land in accordance with the judgment of the court. At the time the land was purchased by Calvin S. Dorwin, there was a mortgage on it for \$100, which Dorwin had assumed to pay. The real estate was bought by the widow, Jane E. Dorwin; she paid no money, but assumed the mortgage lien, and in payment of the purchase-money receipted for her distributive share of her deceased husband's estate. On the 16th day of June, 1859, she married James Spencer, and in October, 1861, she and her husband, James Spencer, conveyed the real estate to William D. Frazee, and Frazee and wife conveyed the land to James Spencer, but no consideration was paid to Jane E. Spencer for the land, except the agreement of her husband to pay the mortgage debt. This agreement was not performed, and the debt was subsequently paid by Jane E. Spencer. A child was the fruit of the marriage of James Spencer and Jane E. Dorwin, and it was living at the time of the former's death, in November, 1862. In January, 1863, the court of common pleas ordered that all of the real and personal estate of which James Spencer died the owner should be delivered to his widow. The widow, Jane E. Spencer, paid the costs of appraising the intestate's property, the expenses of the last sickness and of the funeral, and maintained the child of her marriage with James Spencer until it died at the age of nine years. The money thus expended by the widow exceeded the value of the property turned over to her. In September, 1864, Jane E. Spencer became the wife of Alfred Hill, and so continued until her death, in January, 1876. She died intestate, leaving as her heirs her husband, Alfred Hill, and her children, by her first marriage, Cornelius, Hannah and Mary. Hannah purchased the interest of Alfred Hill and of her brother and sisters. The cross complainant purchased the land from Hannah Dorwin, entered into possession and made lasting and valuable improvements.

Where a plaintiff undertakes to set forth the facts which

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constitute his title, he will fail unless the facts are sufficient to clothe him with the title asserted, and it is the facts specifically pleaded which will control, and not the general averments of the pleading. *Reynolds v. Copeland*, 71 Ind. 422; *State v. Wenzel*, 77 Ind. 428; *Rugsdale v. Mitchell*, 97 Ind. 458; *Indianapolis, etc., R. W. Co. v. Johnson*, 102 Ind. 352, see p. 354; *Louisville, etc., R. W. Co. v. Payne*, 103 Ind. 183; *Louisville, etc., R. W. Co. v. Schmidt*, 106 Ind. 73.

A cross complaint or counter-claim is to be tested by substantially the same rules as a complaint. *Wadkins v. Hill*, 106 Ind. 543; *Conger v. Miller*, 104 Ind. 592.

A question of title may be presented in an action for partition, and that is what the cross complaint here attempts to do. Ordinarily, an action for partition does not present for adjudication the question of title, but the pleadings may be so framed as to present that question, and that is the question which the pleading before us attempts to present. *Thorp v. Hanes*, ante, p. 324, and cases cited; *Kreitline v. Franz*, 106 Ind. 359; *Gullett v. Miller*, 106 Ind. 75; *Cooter v. Baston*, 89 Ind. 185.

A pleading must be good upon the theory on which it is constructed, or it will fall before a demurrer. *Mescall v. Tully*, 91 Ind. 96; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13, and cases cited; *Wadkins v. Hill*, *supra*.

The question, therefore, is this: Do the facts specifically stated in the appellee's cross complaint show title in him?

James Spencer, according to the allegations of the cross complaint, became the owner of the property in controversy by the conveyance made to him by William D. Frazee. His wife, the widow of Calvin S. Dorwin, was the owner of the property by purchase made of the commissioner appointed by the court in the partition proceedings commenced in March, 1856. She is not, therefore, claiming title through her first husband. We do not think that the case rests upon the authority of *Nesbitt v. Trindle*, 64 Ind. 183, for two reasons: First. In this case the conveyance by the wife was

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not made until after her second marriage. Second. The wife here owned the property by virtue of a purchase at a commissioner's sale, and not by descent from her deceased husband. The rule declared in *McMakin v. Michaels*, 23 Ind. 462, does, however, govern the case, for it was there held, that "Where a widow purchased land of which her husband died seized at a commissioner's sale, under proceedings instituted for partition, she stands in the same condition with respect to the sale as a stranger, and takes the land by purchase, not by descent." No reason can be conceived which impeaches the soundness of this decision. It must surely be the law that a party may purchase at a sale made under a decree in a partition suit, and that he acquires the title of the parties sold under such decree. Freeman Coten. and Par., section 548. It results, therefore, that Mrs. Spencer acquired title as a purchaser at the partition sale, and as she conveyed the land to her husband's grantor he acquired, through the conveyance to him, the title derived by his wife from the commissioner. As he held this title at his death his heirs were entitled to the land, and not the heirs of Calvin S. Dorwin, the original owner of the land and the first husband of Jane E. Spencer. If Mrs. Spencer did not take by descent from her first husband, but did take as a purchaser, then the heirs of the first husband can not exclude the heirs of the second husband who was the remote grantor of his wife. It is not enough, therefore, to make out a title to the whole of the property to aver that the appellee's grantors were the children of Calvin S. Dorwin, for, at the time of their mother's second marriage, she held the land as a purchaser, and not in virtue of her first marriage.

If, as is the fact, Mrs. Spencer acquired the land by purchase, she had a right to do what she chose with it, and as she conveyed to Frazee, who afterwards conveyed to her second husband, he took a valid title. It does not matter that the second husband paid no consideration for the conveyance to him, for it is well settled that a voluntary conveyance is

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good against a grantor and his heirs. It is, therefore, very clear that it would not affect the rights of the heirs of the second husband, even if we should regard the conveyance to him and his grantor as a voluntary one.

Considered without reference to the allegations respecting the delivery of the intestate's property to his widow, the cross complaint does not state facts showing such a title as that asserted by the cross complainant. It is true that the children of Mrs. Spencer by her first husband have an undivided estate in the land as her heirs and as the heirs of her child by Spencer, but that is not the title asserted. The theory of the cross complaint can not be considered as sustained by the specific facts pleaded, unless the order of the court subsequent to the death of Spencer can be held to vest the entire title in Mrs. Spencer, for the title asserted is very different from the one that would accrue to the appellee's grantors as the heirs of their father. Regarded as a complaint to settle title in the cross complainant, we think the sufficiency of the pleading must depend entirely upon the effect of the order made subsequent to the death of the second husband. In saying this we are not unmindful of the fact that the appellee claims an equitable lien because his grantor paid off a mortgage lien. If the cross complaint had properly declared on or set out the mortgage, then we should be inclined to hold that the cross complaint entitled the appellee to some relief, irrespective of the other question presented; but, as no case is properly made for the enforcement of the lien, we think the pleading can not be upheld as a complaint to foreclose or enforce a lien. *Wadkins v. Hill, supra.* Where a pleading is founded on a written instrument, it must be set out, or made an exhibit, and so far as the appellee's cross complaint counts on a lien, the rights of the appellee are simply those of an equitable assignee of a mortgage.

We come now to the question as to the effect of the order vesting all of James Spencer's estate in his widow. The appellants rely on this statute: "If a husband die, testate or

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intestate, leaving a widow, and if the entire estate, real and personal, do not exceed three hundred dollars, it shall go without administration to the widow, free from all demands of creditors, in trust for herself and the infant children of the deceased, while they remain infants or unmarried, with remainder over to the widow, and if there shall be no such children, she shall take the whole: *Provided*, That if the widow shall marry while any of such children remain infants and unmarried, the husband shall, within ten days after such marriage, execute his bond, payable to the State of Indiana, in a sufficient penalty, and with security to the approval of the clerk of the proper court of common pleas, conditioned for the true and faithful application of such property, or so much thereof as the widow may have at the time of the marriage, to the benefit of such children, and in default thereof, the title to such property shall vest absolutely in such children." 1 R. S. 1876, p. 411, section 19.

It is conceded by appellee's counsel that this statute was in force in January, 1863, and acting upon this assumption and assuming, without deciding, that the statute was then in force, we will dispose of the question as it is presented to us. It is said by the appellants' counsel, that "Appellants' contention is, that by reason of Hill's failure to comply with the statute, the entire property taken by Mrs. Spencer by virtue of this statute, vested according to the terms of the law in the minor children of James Spencer, then living." In opposition to this contention, appellee's counsel say: "We insist that this order giving the property absolutely to the widow, and not to her in trust for the minor child, is an adjudication of the title. That the order of the court was erroneous we do not question. That it was void we deny."

We think the principle contended for by the appellee is a sound one, for we understand the general rule to be that where a court has general jurisdiction of a subject, its orders and judgments are not void, although they may be erroneous. Where there is an assumption of jurisdiction in a matter

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where there is general jurisdiction of the subject, the presumption is in favor of the authority of the court. *Jackson v. State, etc.*, 104 Ind. 516, and cases cited; *Pickering v. State, etc.*, 106 Ind. 228; *Updegraff v. Palmer, ante*, p. 181. The authority to decide at all involves the authority to decide wrong as well as right. *Snelson v. State, ex rel.*, 16 Ind. 29; *Lantz v. Maffett*, 102 Ind. 23; *Quarl v. Abbett*, 102 Ind. 233, see p. 239 (52 Am. R. 662); *Smurr v. State*, 105 Ind. 125, see p. 127. We think that the court of common pleas had general jurisdiction over the subject, and that its judgment, although erroneous, was not void. If we are correct in this, it results that the judgment, although palpably erroneous, can not be collaterally impeached.

What we have said disposes of all the questions in the case, and we deem it unnecessary to examine the other rulings in detail.

Judgment affirmed.

Filed Sept. 21, 1886.

No. 12,605.

BUSER ET AL. v. SHEPARD ET AL.

SHERIFF'S SALE.—*Wife's Interest in Real Estate.—Act of March 11th, 1875.—*

Tenants in Common.—Where a sale of real estate is made upon a judgment rendered against a husband alone, after the act of March 11th, 1875 (R. S. 1881, section 2508), took effect, whether the judgment was rendered on a contract made before or after the taking effect of such act, the inchoate one-third interest of the wife becomes absolute, as of the date of the sale, in the event of a failure to redeem, and she and the purchaser are thereafter tenants in common.

SAME.—*Sale of Husband's Property.—Redemption by Wife.*—In such case the wife has no right to redeem from an execution sale of her husband's two-thirds interest in the land, as such right exists only in favor of one who has such an interest that the right to redeem is necessary for its protection.

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SAME.—*Mechanic's Lien Previously Acquired Not Affected by Act of 1875.*—

Where a mechanic's lien had attached prior to the taking effect of the act of March 11th, 1875, and the foreclosure and sale were subsequent thereto, such act does not apply, and the wife takes no rights thereunder.

SAME.—*What Complaint to Redeem Must Show.*—A bill to redeem must show on its face that the person seeking to exercise the right has a subsisting interest in the land, derived from the person whose contract or obligation created the lien, or that such interest in some way springs out of the general equity of redemption of such person.

SAME.—*Insufficient Complaint.*—A complaint by a wife who seeks to redeem from an execution sale, which merely shows that at the time of the sale her husband was the fee simple owner of the real estate, and that she was his wife, and not a party to the judgment, does not state a case entitling her to redeem after the year allowed by statute.

SAME.—*Purchaser Pendente Lite.*—One who acquires an interest in property while it is the subject of litigation, is as conclusively bound by the result of a pending suit, as if he had been a party to it from the outset, and his right to redeem must be exercised within one year from the date of the sale.

From the Marion Superior Court.

R. Denny and W. Patterson, for appellants.

V. Carter, for appellees.

MITCHELL, J.—The complaint in this case was in two paragraphs. The first presented an ordinary action for the partition of real estate, and for an accounting for rents and profits by the tenant in possession.

The plaintiff set up that she acquired her interest in the property by virtue of her marital relation with her husband, Jacob N. Buser, who formerly owned the land, and whose interest had been transferred under a judicial sale, through mesne conveyances, to the defendant Shepard. Her claim was, that upon the sale of her husband's two-thirds interest, she became vested with an estate in fee simple in the undivided one-third, under the act of March 11th, 1875.

The second paragraph of the complaint was in effect a bill by the appellant, Rebecca M. Buser, to redeem.

This paragraph alleges, in brief, that a mechanic's lien attached to the land in controversy, January 14th, 1875. It is

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averred further that on the 17th day of November, 1875, a suit was instituted to foreclose this lien, and that a decree and order of sale were entered therein March 3d, 1877. A sale was made on the 6th day of October, 1877, and through certain mesne conveyances from the purchaser at such sale, the title was transferred to the appellee Shepard. The complaint contains an averment that at the date of such sale the appellant's husband, Jacob N. Buser, was the fee simple owner of the land, and that the plaintiff, Rebecca M. Buser, was not a party to the decree of foreclosure. She offered to pay any sum which might be found due after taking an account of the rents and profits, and prayed the intervention of the court to fix the terms upon which she should be permitted to redeem.

A demurrer was sustained to this last paragraph of the complaint, and this ruling presents the first question for consideration. The argument in support of the ruling of the court assumes, that because the sale under the decree of foreclosure of the mechanic's lien was not made until after the act of March 11th, 1875, came in force, the appellant, as the wife of Jacob N. Buser, upon such sale, became vested with an absolute title in fee to the undivided one-third of the land sold, and that she had therefore no interest or right of redemption in the other two-thirds, which, it is contended, the purchaser acquired under the sale, free from any right of redemption by the wife.

The effect of the act of March 11th, 1875 (section 2508, R. S. 1881), is such that in all cases of judicial sales of real property—by which is meant all sales which rest on the judgment, or are made under the supervision of a court—in which a married woman has an inchoate interest, which by the judgment is not directed to be sold or barred, such interest becomes absolute, and vests in the wife in the same manner and to the same extent as if the husband should die on the day of the sale. The language of the act, literally applied, sustains the position assumed on behalf of the appellee, and sup-

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ports the conclusion reached by the court below. The statute has not been, and can not in all cases be so applied.

Where sales of real estate are made upon judgments rendered against a husband after the act took effect, whether such judgments were rendered on contracts made before or after the taking effect of the act, the hitherto inchoate interest of the wife becomes consummate. *Taylor v. Stockwell*, 66 Ind. 505. In such a case the sale and conveyance carry only the undivided two-thirds of the property. The interest of the wife, which prior thereto was inchoate, becomes by the event of an unredeemed sale absolute. Upon the conveyance to the purchaser, the statute consummates in the wife of the execution debtor, by relation, as of the date of the sale, an interest in fee simple, equal to an undivided one-third of the land sold. The purchaser and the wife become thereafter tenants in common of the land previously owned by the husband, neither having any interest, except as such tenants, in the share of the other. *Summit v. Ellett*, 88 Ind. 227; *Pattison v. Smith*, 93 Ind. 447.

Where this is the case, the wife has no such interest by reason of the sale and conveyance of the two-thirds interest of her husband, as would give her a right of redemption. The right of redemption exists only in favor of one who has an interest in the land sold. This interest may be either legal or equitable, absolute or inchoate. It may have arisen by operation of law or otherwise, but it must be an interest, the security and protection of which render the equitable right of redemption necessary, and it must have been derived mediately or immediately from the mortgagor or judgment debtor. 5 Wait Actions and Def. 427; 2 Jones Mort., section 1055; 3 Pomeroy Eq. Jur., section 1220.

The right of redemption of a tenant in common is confined to such encumbrances as affect as well the interest of the redemptioner as that of the other tenants. *Watkins v. Eaton*, 30 Maine, 529; *Gentry v. Gentry*, 1 Sneed, 87.

After the wife's interest in the lands of her husband be-

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comes consummate under the act of 1875, she has no estate or interest in that part sold, which is the subject of protection. That part which vests in her needs no protection, as it is in no wise affected by the sale. *Opdyke v. Bartles*, 3 Stock. (N. J.) 133.

To give the statute under consideration such a construction, as would authorize the wife to redeem from an execution sale of her husband's interest in the land, would render it practically impossible in most cases for a purchaser to acquire an irredeemable title. In suits upon contracts executed by her husband alone, she could not be made a party, and there would be no means of cutting off the wife's right of redemption, except by bringing a suit for that purpose, or by waiting the lapse of time.

This much has been said upon the appellee's theory that the act of March 11th, 1875, controlled in determining the respective rights of Mrs. Buser and the purchaser under the decree of foreclosure referred to in the complaint.

Upon the facts stated in the paragraph under consideration, the statute above mentioned has, however, no application.

It will be observed that the mechanic's lien upon which the decree and order of sale, under which the land was sold, were rendered, attached in January, 1875. This was before the statute in question was passed. It results that at the time the act went into effect, a specific lien had been acquired upon the land, which was in no manner affected by the enactment under consideration. As against this lien, and a sale made in the enforcement of it, the rights of the wife were no greater after than before the passage and taking effect of the act. This conclusion follows necessarily from a due regard to the constitutional provision forbidding the States to pass any "law impairing the obligation of contracts." Const. U. S., art. 1, section 10. One of the legal remedies for the enforcement of a contract in favor of mechanics and material men, was the acquisition and enforcement of a specific lien allowed by law upon the property

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which was improved and rendered more valuable by the bestowal of their labor and material upon it. This lien at the time it attached affected not only the two-thirds, but the whole of the property. The foundation of the lien was the contract of the owner of the property with the builder or material man.

Remedies which are available for the enforcement of a contract, at the time and place where it is made, are part of its obligation. It is not to be supposed that the Legislature intended, by the act of 1875, to impair this obligation to any material extent. It was beyond its power to do so. *McGlothlin v. Pollard*, 81 Ind. 228; *Vermillion v. Nelson*, 87 Ind. 194, and cases cited; *Gunn v. Barry*, 15 Wall. 610.

An enactment which would render an existing mechanic's lien, covering an entire property belonging to a husband, subordinate to the right of the wife to take one-third of such property absolutely, would be a material obstruction and impairment of a vested right which accrued under a contract. Since, therefore, the sale was not affected by the provisions of the act of 1875, it is clear the only right of Mrs. Buser, if she had any right at all, was to redeem. *Kissell v. Eaton*, 64 Ind. 248; *Ragsdale v. Mitchell*, 97 Ind. 458. Whether she had a right of redemption or not, depends upon whether the facts stated in the second paragraph of the complaint show that she had an interest in the property sold, either inchoate or consummate, which put her in privity with the person whose contract created the lien.

A bill to redeem must show on its face that the person seeking to exercise the right has a subsisting interest in the land, derived immediately or remotely from the person whose contract or obligation created the lien, or that such interest in some way springs out of the general equity of redemption of such person. *Grant v. Duane*, 9 Johns. 591.

A party claiming an interest under a derivative title must show how that title was derived, so that the defendant may be informed of the nature of the title and interest claimed.

It must appear in such a case, from the facts stated, that the party claiming the right to redeem has derived such an interest in the property sold as entitles him to redeem in the right of the original encumbrancer. This for the reason that the defendant may, upon the facts being fully exhibited which show the plaintiff's interest, admit his claim without further expense. *Smith v. Austin*, 9 Mich. 465.

Applying these principles to the case in hand, we find the second paragraph wholly deficient as a bill to redeem. There is an entire absence of any statement which indicates who owned the land when the mechanic's lien attached. The only statement on the face of the complaint, which in any way connects the appellant, Rebecca M. Buser, with the title, is the allegation that at the time of the sale Jacob N. Buser was the fee simple owner, and that the appellant, Rebecca, was his wife. Whether her husband owned the land at the time the lien attached, or whether he claims in the right of the encumbrancer, or otherwise, or whether if he does so claim, he took his title *pendente lite* or not, is left to conjecture. If the title of the appellant's husband was acquired pending the litigation, or after the decree foreclosing the lien was rendered, then both he and the appellant were bound by the decree, and their right to redeem must have been exercised within one year. If he acquired his title from a source other than through the encumbrancer, then she has no right of redemption.

Upon the supposition that the appellant stated her right, in her bill, in the manner most advantageous, all that can be said is, more than one year having elapsed since the sale, her right to redeem does not appear, and the demurrer to the second paragraph of the complaint was therefore properly sustained.

The next error complained of is the overruling of the appellant's demurrer to the second paragraph of the answer to the first paragraph of the complaint.

The substance of this answer, which was directed to that

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paragraph of the complaint which sought partition, is in effect that the appellant's husband was the owner of the land when the mechanic's lien attached, on January 14th, 1875; that during the pendency of the suit to foreclose the lien, she and her husband joined in a conveyance to one Myers; that while the suit was still pending Myers reconveyed the land to her husband. Subsequently, a judgment and decree were given, foreclosing the lien, after which, on October 6th, 1879, the land was sold under the decree. By mesne conveyances from the purchaser under this decree, the title has become vested in the appellee Shepard.

As we have already seen, the lien having attached prior to the taking effect of the act of March 11th, 1875, the sale was not within the provisions of that act, and no absolute title vested in the wife. Having been vested with no estate, in no event would she have been entitled to partition. Even if the sale had been within the act of 1875, since, by joining her husband in a conveyance to Myers, she extinguished her inchoate interest for the time being, she was not in a position to claim that the reconveyance from Myers restored her to her original interest, free from the encumbrance of the mechanic's lien. By the reconveyance from Myers, her husband took a new estate in the land, as of the date of such reconveyance. The estate which he then took, as well as the inchoate interest which accrued to his wife, was subject to the existing encumbrance, and the interests of both were bound by the decree which was afterwards given in the suit pending at the time the reconveyance was made. *Hudson v. Evans*, 81 Ind. 596; *Truitt v. Truitt*, 38 Ind. 16; 2 Pomeroy Eq. Jur., section 632.

One who acquires an interest in property while it is the subject of litigation, is as conclusively bound by the result of a pending suit as if he had been a party to it from the outset. *Bellamy v. Sabine*, 1 DeGex & J. 566; *Tilton v. Cofield*, 93 U. S. 163; *Smith v. Hodsdon*, 3 Atl. R. 276.

As, however, the sale was, for the reasons already given, in

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no wise affected by the statute under which it is claimed the appellant's interest became a vested estate, we pursue this branch of the inquiry no further.

This feature of the case, as well as the other questions discussed, which we do not notice in detail, is fully disposed of by the conclusions already reached.

Under the facts which appear in the answer, the appellant had no right except a right to redeem. Having come into whatever interest she had in the land by the reconveyance from Myers to her husband pending the suit, she must have exercised her right to redeem within one year from the date of the sale. Not having done this, upon the facts as they appear, we can not perceive that she is entitled to any remedy.

Judgment affirmed, with costs.

Filed Sept. 21, 1886.

No. 12,586.

RINGLE ET AL. v. THE FIRST NATIONAL BANK OF KENDALLVILLE ET AL.

SHERIFF'S SALE.—*Effect of Receipt by Purchaser of Part of Redemption Money.*

—*Lien.*—The purchaser of real estate at sheriff's sale is not bound to receive less than the whole amount of the redemption money; but if he receives a part, he thereby surrenders his right to enforce a forfeiture under the statute, and converts his purchase into a mere lien to secure the payment of the balance of the redemption money.

SAME.—*Suit by Purchaser to Enforce Lien.*—*Deed.*—In such case it is not necessary to the purchaser's cause of action to enforce his lien, that he should take a deed to the real estate from the sheriff, as such deed would not strengthen the lien.

SAME.—*Statute of Limitations.*—The ten years' statute of limitation does not apply to a suit by the purchaser at a sheriff's sale to enforce his lien.

107	435
108	155
107	425
147	29
107	435
158	318

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PRACTICE.—*New Trial.*—*Excessive Damages.*—A question as to excessive damages must be presented by an assignment in the motion for a new trial.

From the Noble Circuit Court.

V. C. Mainz, for appellants.

A. A. Chapin and R. P. Barr, for appellees.

Howk, C. J.—By the assignment of errors upon the record of this cause, the sufficiency of appellees' complaint to withstand a demurrer, for the alleged want of facts, is the first question we are required to consider and decide herein.

This suit was commenced by the appellees, First National Bank of Kendallville and John Mitchell, against the appellants, Peter Ringle and Nancy Ringle, on the 10th day of January, 1885. In their complaint the appellees showed at great length, that long before the 13th day of May, 1871, divers named parties had recovered divers judgments for divers sums of money and costs, against appellant Peter Ringle, in the court below; that upon such judgments, executions had been duly issued by the clerk of such court, and directed and delivered to the sheriff of Noble county; that, by virtue of such executions, the sheriff of such county had levied upon the north half of lot number forty-three, in Mitchell's addition to the town of Kendallville, in Noble county, as the property of appellant Peter Ringle, to satisfy such executions; that after having advertised the time and place of sale, in the manner prescribed by law, the sheriff aforesaid did, by virtue of such executions, on the 13th day of May, 1871, at the door of the court-house of Noble county, offer and sell at public auction the real estate above described to Lydia A. Bicknell and Stephen Majors for the sum of \$666.67, that being the highest and best bid made therefor and more than two-thirds of the appraised value thereof; and that such sheriff then and there executed to said Bicknell and Majors a certificate of their purchase of such real estate, as

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required by the statute, a copy of which certificate was filed with and made part of appellees' complaint.

And appellees alleged that, by the terms of such certificate of purchase and of the law then in force in relation to sheriff's sales of real estate, appellant Peter Ringle had the right to redeem such real estate from such sale thereof by the payment of the amount of the purchase-price, at any time within one year from the date of such sale, with ten per centum interest thereon; that, on March 20th, 1872, the said Lydia A. Bicknell, in payment and satisfaction of an antecedent debt then due from her to the appellee Bank, assigned in writing to such bank all her right, title and interest in and to such certificate; that, on May 12th, 1872, appellant Peter Ringle, with full knowledge of all the facts, paid the appellee Bank, the sum of \$167, as redemption money on such sale and purchase, and to said Stephen Majors the sum of \$133, which was then received upon the redemption of such real estate from such sale; that, on January 22d, 1873, appellant Peter Ringle paid the further sum of \$50 as redemption money from such sale; that, on April 2d, 1874, the said Stephen Majors assigned in writing all his right and interest in and to such certificate to the appellee Mitchell, then president of such bank, and on the same day the appellant Peter Ringle paid the appellees as redemption money the further sum of \$150; and that there was due and unpaid, of such redemption money, the sum of \$900.02, including interest, which appellant Peter Ringle still owed.

And the appellees further said that appellant Nancy Ringle was the wife of said Peter Ringle, but was not married to him until January 1st, 1884, and subsequent to all the proceedings aforesaid, and that any interest she had in such real estate was subject and junior to the lien of appellees, created by such sale and certificate of purchase. Wherefore, etc.

Appellants' separate demurrers to appellees' complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, were overruled by the court, and these rul-

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ings are assigned here as errors. It is claimed by appellants' counsel, as we understand his argument, that appellees' complaint is bad, and the demurrers thereto ought to have been sustained, because, upon the facts stated therein and under the redemption law of June 4th, 1861, in force at the time, they had the right, after the expiration of one year from the date of the sheriff's sale, to demand and receive from the sheriff of Noble county a sheriff's deed of the real estate sold. Counsel says: "We think the only remedy the appellees have in this case, is under the statute cited, and under it they have a right to a deed at any time after the expiration of the year for redemption; for, under this statute, at the expiration of the year for redemption, if not redeemed, the right of the holder of such certificate to a deed thereunder becomes absolute, and so continues until the execution of such deed. *Maddux v. Watkins*, 88 Ind. 74."

Doubtless, it is true, that appellees had the right, under the statute, to demand and receive from the sheriff of the county a proper conveyance of the real estate, described in their certificate. But it is equally true, that, upon the facts stated in appellees' complaint, such sheriff's deed, however absolute in its terms, "would not operate as against the appellants to convey the legal title to such real estate, except as a security in the nature of a mortgage for the unpaid balance of the redemption money." *McMakin v. Schenck*, 98 Ind. 264. *Cox v. Ratcliffe*, 105 Ind. 374.

In the case in hand, appellants' counsel virtually concedes that, if the appellees had taken a deed from the sheriff of the real estate described in their certificate, and they had alleged that fact in their complaint, it would have been sufficient to withstand their demurrers, and to have entitled appellees to a decree enforcing their lien upon the real estate for the unpaid balance of the redemption money. We are of opinion, however, that it was not necessary to the sufficiency of appellees' cause of action, that they should have taken a deed of the real estate from the sheriff before or after

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they commenced their suit. The facts stated in their complaint were sufficient to show that they had a lien upon the real estate to secure the payment of the balance of the redemption money. A sheriff's deed of the real estate might have afforded additional evidence of the existence of such lien; but the lien existed without any such deed, and was not even strengthened thereby. In *Hughart v. Lenburg*, 45 Ind. 498, the court said: "The purchaser is under no obligation to receive less than the whole amount of the purchase-money. But if he receive a part, he thereby changes the character of his title, surrenders his right to enforce a forfeiture under the statute, and by enabling the owner to redeem after the year, converts his purchase into a mere lien to secure the payment of the balance of the purchase-money." The doctrine here declared has been approved and followed in many of our decisions. *Spath v. Hankins*, 55 Ind. 155; *Tinkler v. Swaynie*, 71 Ind. 562; *Cox v. Arnsmann*, 76 Ind. 210; *McOuat v. Cathcart*, 84 Ind. 567; *Taggart v. McKinsey*, 85 Ind. 392; *Ayers v. Slifer*, 89 Ind. 433; *Butt v. Butt*, 91 Ind. 305; *Rector v. Shirk*, 92 Ind. 31; *Shade v. Creviston*, 93 Ind. 591; *Beatty v. Brummett*, 94 Ind. 76.

Appellees' complaint stated facts sufficient to constitute a cause of action, and the demurrers thereto were correctly overruled.

In the second paragraph of his separate answer, appellant Peter Ringle alleged that appellees' cause of action did not accrue in the last ten years before the bringing of this action. Wherefore, etc. To this paragraph of answer, the court sustained a demurrer, and this ruling is assigned here as error.

The limitation pleaded is applicable only to actions brought by the execution-debtor for the recovery of real property sold on execution, and to actions upon bills of exchange, promissory notes and other written contracts for the payment of money. The case in hand does not fall within either of these classes of actions. Manifestly, therefore, the court did

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not err in sustaining a demurrer to such second paragraph of answer. *Nutter v. Hawkins*, 93 Ind. 260.

The only other error, properly assigned by the appellants, is the overruling of their motion for a new trial. But the evidence is not in the record, and in the absence of the evidence this assignment of error presents no question for our decision. It is claimed in argument, by appellants' counsel, that the court erred in allowing the appellees' interest. This error, if it exists, is not shown by the record. Besides, in their motion for a new trial, appellants did not assign, as cause therefor, either that the damages assessed were excessive, or that the court had erred in assessing the amount of appellees' recovery. Therefore, even if the evidence were properly in the record, there would be no question properly presented in relation to the amount of appellees' recovery. *Floyd v. Maddux*, 68 Ind. 124; *Warner v. Curran*, 75 Ind. 309; *Douch v. Bliss*, 80 Ind. 316.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Sept. 18, 1886.

No. 12,049.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. FOSTER.

JURISDICTION.—*Railroad.—Negligence.—Escaping Fire.—Injury to Real Estate.*

—An action against a railroad company to recover for an injury to fences and growing pasture, caused by fire from a locomotive, is an action for an injury to real estate within section 307, R. S. 1881, and is properly brought in the county where the real estate is situate, notwithstanding the defendant has no agent or office for the transaction of business in such county, and the joining of a claim for damage to personal property will not oust the jurisdiction.

107	430
130	138
107	430
154	29
107	430
166	589

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PLEADING.—*Answer in Abatement.*—*Demurrer.*—*Reaching Back.*—A demurrer to an answer in abatement does not reach back to the complaint.

From the Warren Circuit Court.

C. W. Fairbanks, J. McCabe and E. F. McCabe, for appellant.

ZOLLARS, J.—It is alleged in appellee's complaint, that as the result of appellant's negligence, fire escaped from one of its trains passing over its road in Warren county, and ignited rubbish and inflammable material upon its right of way; that the fire spread to his land and destroyed fences, growing pasture and a quantity of hay.

Appellant, by counsel, at the proper time, challenged the jurisdiction of the court, and now insists that the action should have been brought in the Fountain Circuit Court, and not in Warren county.

For a plea to the jurisdiction of the court, and in abatement, appellant answered that it had no office for the transaction of business in Warren county, but had such an office in Fountain county; that it had no agent located in Warren county; that no summons was taken out to the sheriff of Warren county, and that the clerk, upon the order of appellee, issued a summons to the sheriff of Fountain county.

Appellant's contention rests upon the proposition that an action of this character must be brought in the county where the company has an office or agent, in other words, in a county where the company may be said to have a residence, as provided by section 312, R. S. 1881.

We think, however, that the action is for an injury to real estate, within the meaning of section 307 of the code, R. S. 1881, and was properly brought in Warren county, where the real estate is situated. The fire destroyed fences and growing pasture, and these were a part of the realty. *Owens v. Lewis*, 46 Ind. 489 (15 Am. R. 295), and cases there cited. Their destruction, therefore, was an injury to the real estate.

The hay, destroyed in the stack, was personal property.

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Conceding for the present, without in any way indicating an opinion, that if its destruction had been the only loss by the fire, the Warren Circuit Court would not have had jurisdiction in an action for its loss, it does not follow at all that the joining of that claim with the claim for the injury to the real estate ousted the jurisdiction of that court. It is not questioned that the service was good, if the Warren Circuit Court had jurisdiction. Upon the foregoing, we conclude that the court below did not err in sustaining the demurrer to appellant's plea in abatement.

The sufficiency of the complaint was not questioned below by demurrer, nor by a motion to arrest the judgment; nor is its sufficiency questioned in this court, except by the assignment that the court below erred in not carrying the demurrer to the plea back, and sustaining it to the complaint. It is a sufficient answer to this assignment of error to say that demurrers to answers in abatement do not reach back to the complaint, because such answers are not addressed to the complaint. *Price v. Grand Rapids, etc., R. R. Co.*, 18 Ind. 137. See, also, *Anderson Building, etc., Ass'n v. Thompson*, 88 Ind. 405.

The case of *Aetna Ins. Co. v. Black*, 80 Ind. 513, is not in conflict with the *Price* case, when properly considered. In this latter case, there was an assignment that the complaint did not state sufficient facts.

The judgment is affirmed, at appellant's costs.

Filed Sept. 21, 1886.

No. 12,416.

BURROW v. THE TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY.

RAILROAD.—*Surveying Right of Way.*—*Trespass.*—An entry upon land by a railroad company for the purpose of making a survey for a right of way is not an actionable wrong.

SAME.—*Contract for Right of Way.*—*Consideration.*—*Power of Attorney.*—A

107 432
126 470
130 380
107 432
181 228
133 298
107 432
137 620
107 432
146 263
107 432
164 347

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written contract which releases and quitclaims to certain persons, in consideration of benefits to accrue, a right of way for railroad purposes, in trust for a railroad company, is not a power of attorney, but it invests in the persons named an immediate right to the real estate described.

SAME.—Description.—Right of Company to Select Particular Location.—Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and no more definitely, it vests in the railroad company the right to select the particular location.

SAME.—Relinquishment of Damages.—Subsequent Purchaser.—Notice.—Where a property owner, in conveying a right of way to a railroad company, relinquishes all claims for damages by reason of the construction of the railroad upon the land conveyed, it is final as to all damages that can arise from a proper construction of the road, and protects the company from liability to a subsequent purchaser of the land, with notice.

SAME.—License.—Revocation.—A license founded on a valuable consideration is not revocable.

REAL ESTATE.—Conveyance.—Description.—It is not the office of a description to identify the land conveyed, but to furnish means of identification.

STATUTE OF FRAUDS.—Not Available to Third Person.—A third person can not make the statute of frauds available to overthrow a transaction between other persons.

CONTRACT.—When Not Presumed Verbal.—Pleading.—A contract will not be presumed to be verbal where the pleading declaring on it alleges that "a copy of said written contract is herewith filed and made a part of this answer, as Exhibit A," and where, following the answer, there is a copy of the contract.

From the Marshall Circuit Court.

G. E. Ross, for appellant.

J. G. Williams, for appellee.

ELLIOTT, J.—There are three paragraphs of the appellant's complaint, and although they differ in the relief sought, the gravamen of each of the causes of action is the same.

The essential facts in each of the paragraphs are that the appellant is the owner in fee of the real estate described, that the appellee unlawfully asserts a right to the possession of the property, and has wrongfully invaded the appellant's rights. The affirmative paragraph of the appellee's answer alleges that it is an incorporated railway company; that in the construction of its road, it became necessary to take pos-

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session of part of appellant's land; that before entering upon the land, except for the purposes of a survey, it did purchase a strip of land from William J. Myers, the grantor of the appellant; that Myers executed to it a written contract; that appellant had notice of this contract before his purchase, and that for the consideration expressed in the contract, "Myers did relinquish and release all claims for damages by reason of the location and construction of the railway."

It is said by counsel that "the contract or release declared on is not alleged to be in writing," and, therefore, must be presumed to be a verbal one. The counsel is right as to the abstract proposition of law, that a contract not alleged to be in writing will be presumed to be a verbal one. *Langford v. Freeman*, 60 Ind. 46; *Goodrich v. Johnson*, 66 Ind. 258. But while the counsel is right as to the law, he is wrong as to the fact, for the answer says: "A copy of said written contract of release is herewith filed and made part of this answer as Exhibit A." Where a contract is so described, it can not, of course, be presumed to be a parol one.

Following the answer is a copy of the contract referred to by the pleader, and it must be deemed a part of the pleading. *Northwestern Mutual Life Ins. Co. v. Hazelett*, 105 Ind. 212.

The entry for the purpose of making a survey was not an actionable wrong. *Cooley Const. Lim.* (5th ed.) 594.

The written contract reads thus:

"I, William J. Myers, of the county of Marshall, in the State of Indiana, in consideration of the advantages which will accrue to me in particular, and the public generally, by the construction of a railroad between Logansport, Cass county, Indiana, and South Bend, St. Joseph county, Indiana, and for the purpose of inducing the construction of such railroad and avoiding condemnation proceedings, do hereby release and quitclaim to J. Leiter and A. D. Toner, of Kewanna, Indiana, in trust for such railroad company or companies as may cause such railroad to be constructed, the right of way, for railroad purposes only, for such railroad,

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described as follows, to wit: A strip of ground ninety-nine feet wide, being forty-nine and one-half feet from the center on each side of the main track of said railroad as the same may be finally located and constructed, through the following real estate, in Marshall county, State of Indiana, to wit: The southwest sixty-one (61) rods in width of the north two-thirds ($\frac{2}{3}$) of lot number one (1); or the northwest fractional quarter of section twenty-one (21), township thirty-two (32) north, of range one (1) east, bounded on the west by the Winamac State road as now located, and on the east by Maxinkuckee lake—containing seventeen acres more or less. And I do hereby empower and direct the said J. Leiter and A. D. Toner to convey by good and sufficient deed the said right of way to the company or companies constructing said railroad, and do release and relinquish all claims for damages by reason of the location and construction of said railroad through or upon the above described real estate.

“Witness my hand and seal this 6th day of September,
A. D. 1882.

“(Signed)

WILLIAM J. MYERS.

“Executed in presence of A. B. FITCH.”

It is contended by counsel that this instrument is a mere power of attorney, investing the persons named with authority to convey a right of way. We can not so regard it. It vests in the persons named an immediate right to the real estate described, and does more than constitute them agents to convey the land. In truth, the land is directly and explicitly conveyed to them as trustees, and they are authorized to execute their trust by proper conveyances.

The instrument is a contract, founded upon a valuable consideration, and not a mere naked license. It is, however, settled law that a license founded on a valuable consideration is not revocable, and there is here a valuable consideration, accepted as sufficient by the agreement of the parties. If, therefore, we were to hold that the instrument is only a license, the appellant could not revoke it. *Strosser v. City of Fort*

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Wayne, 100 Ind. 443, see p. 447; *Rogers v. Cox*, 96 Ind. 157, see p. 158 (49 Am. R. 152); *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Miller v. State*, 39 Ind. 267; *Snowden v. Wilas*, 19 Ind. 10.

The objection that the description of the land is insufficient can not be maintained. It is not the office of a description to identify the land conveyed, but to furnish means of identification, and that is done by the description in the instrument before us. The decision in *Indianapolis, etc., R. W. Co. v. Rayl*, 69 Ind. 424, is directly in point against the appellant, and it finds support from other cases. *Paul v. Connersville, etc., R. R. Co.*, 51 Ind. 527; *Baltimore, etc., R. R. Co. v. Highland*, 48 Ind. 381; *Chidester v. Springfield, etc., R. W. Co.*, 59 Ill. 87.

Contracts such as the one before us are made to carry into effect a purpose known to the contracting parties and authorized by a public law, and they must have a reasonable construction. It can not be known in advance where the railway will be located, and it is consequently held that, within fair and reasonable restrictions, such contracts as the present must be understood as vesting in the railway company a right to select a location.

In the additional brief filed by counsel for the appellant, it is said: "There is nothing in the answer to show that appellant's title came through Wm. J. Myers." But, here again, is a mistake of fact, for the answer avers that "The plaintiff, at the time he purchased said real estate from said Myers, had full knowledge of said contract, so executed by said Myers, and that the said railroad company intended to construct their said road upon said land under the right given it by said contract of release and license."

As the rights of the appellee were acquired prior to the purchase by the appellant, and as he purchased with knowledge of those rights, he can not successfully charge the appellee with an actionable wrong in exercising them. The rights of the appellee are prior in time, and it can not be a

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trespasser in entering on the land for the purpose of enjoying the easement granted by the former owner of the property.

If the appellant did not have a prior title and right to the land, he can not recover, for, if the appellee has done no more than use the easement granted, it has invaded no legal rights of his, and where there has been no invasion of a right there can be no action.

It would do the appellant no good to declare the title to be in Leiter and Toner, for if it was then they alone could maintain an action, even if the railroad company was a wrong-doer. But the fair and just construction of this contract is that it grants an easement to the railroad company, and that for doing any act within the grant, and reasonably necessary to enjoy the easement granted, the company can not be deemed a wrong-doer.

It is perhaps true that the answer is not well drawn, and is censurable for its uncertainty, but the remedy for this defect is by motion, and not by demurrer.

The question as to the construction of the instrument executed by the appellant's grantor is also presented by the motion for a new trial, and it is argued that the instrument vests no estate in Toner and Leiter. We do not deem it necessary to repeat what we have said, but we may add, without repeating, that the instrument does vest in Toner and Leiter an interest in the land for railroad purposes, and that a valuable consideration is yielded for the estate granted, so that the trust is not a naked one. It is doubtless true that the grant was a conditional one, liable to be defeated by the failure to use the land for the purpose for which it was granted, but the appellant can not defeat the grant by preventing the building of the railroad. It would be strange if a man could grant a strip of land for railroad purposes, and then defeat his own grant, by himself preventing the use of the land for the purpose for which it was conveyed by the one party and accepted by the other.

The appellant brought the action, averring that he owned

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the fee of the land upon which the alleged unlawful entry was made, and this fact he was bound to establish. *Broker v. Scobey*, 56 Ind. 588. The question is not whether the title is still in Leiter and Toner, but whether it is in the appellant, and it is not material whether Leiter and Toner have, or have not, made a formal conveyance of the land, or, indeed, any conveyance, whether by way of license or otherwise, for, if the appellant is not the owner of the land, it is utterly immaterial to him who does own it.

If it were conceded that Leiter and Toner were bound to transfer the land to the railroad company, it would not avail the appellant, for, if the transfer was by parol, he could not successfully interpose the statute of frauds to break down their contract. He is not a party to the transaction between the railroad company and Leiter and Toner, and can not, therefore, make the statute of frauds available to overthrow the transactions between them. *Dixon v. Duke*, 85 Ind. 434; *Savage v. Lee*, 101 Ind. 514; *Bodkin v. Merit*, 102 Ind. 293; *Foltz v. Wert*, 103 Ind. 404. The land had become Leiter and Toner's before he had any interest whatever in it, and he can not defeat contracts, whether in writing or by parol, made by them for the purpose of carrying into effect the condition of the grant.

The clause in the contract reading thus, "and I do release and relinquish all claims for damages by reason of the location and construction of said railroad through or upon the above described real estate," exerts an important influence upon this case, since it effectually cuts off all claim for damages arising from the construction of the railroad. Where a property-owner executes a release expressed in such comprehensive terms as those employed in the instrument under immediate mention, he parts with all right to recover for injuries resulting from the careful and skilful construction of the railroad through his land. In such cases as this, one general release, or one assessment of damages, covers all damages that can arise from the proper construction of the

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railroad. *City of North Vernon v. Voegler*, 103 Ind. 314; *Montmorency G. R. Co. v. Stockton*, 43 Ind. 328; *Lafayette, etc., Co. v. New Albany, etc., R. R. Co.*, 13 Ind. 90.

This release executed by Myers protects the railroad company from liability for damages, as the appellant bought with notice of its execution. The effect of the release is to allow the use of the land for the purpose of constructing a railroad, and this involves the right to do all incidental acts essential to the enjoyment of the principal thing granted.

Judgment affirmed.

Filed Sept. 14, 1886; petition for a rehearing overruled Nov. 17, 1886.

No. 12,678.

SCHNECK v. COBB.

DRAINAGE.—Bond.—Number of Sureties.—Dismissal.—In the absence of any showing that a bond, with one surety, taken by the county auditor in a drainage proceeding instituted under section 4286, R. S. 1881, is insufficient in other respects, it is error to dismiss the petition on the sole ground that that statute seems to require more than one surety in the bond. See section 1221, R. S. 1881.

From the Jackson Circuit Court.

A. P. Charles, R. Hill and R. N. Lamb, for appellant.

W. K. Marshall, for appellee.

Howk, C. J.—In section 4286, R. S. 1881, it is provided as follows: "Before the board of county commissioners shall establish any ditch, drain, or watercourse, there shall be filed with the auditor of such county a petition, signed by one or more of the land-owners whose lands will be liable to be affected by or assessed for the expense of the construction of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route, and ter-

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minus; and shall give a bond, with good and sufficient freehold sureties, payable to the State, to be approved by the auditor, conditioned to pay all expenses in case the board of commissioners shall fail to establish said proposed ditch, drain or watercourse."

Acting under the foregoing statutory provisions, and in intended compliance therewith, as we may suppose, the appellant, Schneck, on the 2d day of June, 1884, filed with the auditor of Jackson county his petition for the establishment and construction of a certain ditch or drain, in such county, and also his bond, with a single surety, payable to the State, then and there approved by the auditor of the county, and conditioned as required by the statute. On the 6th day of June, 1884, as shown by the record before us, appellant presented his petition and bond to the board of commissioners of the county; that upon an examination then had of such petition, the county board found "it sufficient, and that the same contained all the allegations required by law;" and that thereupon the county board ordered that three named persons be appointed to view the proposed work, to meet at a designated time and place and proceed, with a competent civil engineer, to view and mark out the ditch as the law directed, and to file their report with the county auditor at least four weeks before the September term, 1884, of the board, until which time this cause was continued. It is further shown by the record, that the viewers appointed filed their report herein on the 2d day of August, 1884, in the office of such county auditor; that at the September term, 1884, of such county board, before any action was had by the board upon the viewers' report, the appellee, Cobb, appeared and moved the board in writing "to dismiss the petition herein, because there is no bond of the petitioner on file, with sufficient freehold sureties, approved by the auditor of Jackson county;" and that the board sustained this motion, and dismissed appellant's petition at his costs.

On appeal to the circuit court, the appellee renewed his

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motion to dismiss the petition herein. The court sustained this motion, and the appellant excepted and filed his bill of exceptions.

The only question presented for our decision by this appeal may be thus stated: Did the court err in sustaining appellee's motion to dismiss appellant's petition? We are of opinion that this question must be answered in the affirmative. It is manifest that the only objection presented by appellee's motion to dismiss the appellant's petition is, that the bond therewith filed was executed by the petitioner with a single surety, when the statute seems to require that such bond should have been executed by two or more sureties. Appellee made no showing either that the surety in the bond was not a freeholder, or that he was not a sufficient surety. As the bond was taken and approved by the proper county auditor, it must be presumed, in the absence of any showing to the contrary, that the single surety who executed such bond was a sufficient freehold surety. In *Ward v. Whitney*, 8 N. Y. 442, it is said: "The defendants insist that this is not a valid bond, for the reason that the statute requires the bond to be executed by the debtor or his agent, with such *sureties* as shall be approved by the officer, and that this bond has but one surety. An omission to procure more than one surety does not invalidate it. *Johnson v. Laserre*, 2 Ld. Raym. 1459; *Mitchell v. Thorp*, 5 Wend. 287."

It is certain, we think, that the bond filed by the appellant, with his petition herein, was not void. It was approved by the proper county auditor, and was conditioned as required by the statute. In section 1221, R. S. 1881, it is provided, *inter alia*, that no "bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged," etc. Under this section of the statute, it is clear that the bond given by the appellant herein, and approved by the county auditor in the discharge of the duties of his office, was

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a valid obligation, and binding on both the principal and surety. This is settled by our decisions. *Hawes v. Pritchard*, 71 Ind. 166; *Carver v. Carver*, 77 Ind. 498; *Fawcner v. Baden*, 89 Ind. 587.

Of course, if a proper showing had been made that the surety in the bond was not a freeholder, or was not a sufficient surety, the petitioner might have been required to give an additional bond, with good and sufficient freehold sureties, to be approved by the auditor. But, in the absence of such a showing, it was error to sustain the appellee's motion and to dismiss the appellant's petition.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the motion to dismiss the petition, and for further proceedings not inconsistent with this opinion.

Filed Sept. 21, 1886.

No. 12,793.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. THOMPSON, ADMINISTRATOR.

NEGLIGENCE.—*Complaint*.—A complaint to recover damages for the death of a person must show that the death resulted from the negligent acts charged.

SAME.—*Widow*.—*Competency as Witness*.—A widow is a competent witness for the plaintiff in an action by the administrator of her husband against a railroad company to recover damages for negligently causing his death. Sections 498 and 499, R. S. 1881, do not apply to such actions.

SAME.—*Railroad*.—*Fraudulent Use of Pass Issued to Another*.—*Liability of Carrier*.—One who fraudulently attempts to ride on a non-transferable pass issued to another person, is not a passenger to whom the carrier owes a duty to carry safely, and he can not maintain an action for injuries caused by the carrier's negligence.

SAME.—*Finding Pass on Person of Deceased Traveller*.—*Presumption*.—*Burden of Proof*.—Where a non-transferable pass issued to another person is

107	448
125	386
107	448
128	398
129	471
107	448
131	329
132	474
132	488
107	448
135	73
107	442
138	66
107	448
140	413
141	552
107	448
147	119
107	442
150	345
150	630
152	418
107	442
154	80
154	90
107	442
161	108
161	110
107	442
168	412
107	442
171	50

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found in the pocket of one who is killed by the negligence of a railroad company, but there is no other evidence that the deceased had procured the pass fraudulently, or was attempting to travel on it, the burden is on the defendant, in an action for damages, to overcome the presumption that the deceased was a *bona fide* passenger.

SAME.—Conflict of Presumptions.—Where the facts of a case are consistent with both honesty and dishonesty, the courts will adopt the construction which is in favor of honesty and good faith.

SAME.—Presumption that One is a Lawful Passenger.—Conductor's Check.—Where one is carried upon a passenger train for many hours, and the conductor of the train has given him a check, which is found upon his person after he has been killed by the carrier's negligence, it will be presumed, in the absence of countervailing evidence, that he was lawfully upon the train as a passenger.

SAME.—Defective Bridge.—Burden of Proof.—Where a passenger, rightfully on a train, is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence, and the *onus* is upon it to prove the contrary.

SAME.—Bridge Weakened by Flood.—Extent of Carrier's Liability.—Where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it, the railroad company is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill. *Aliter*, if its unsafe condition may reasonably be discovered in time to avoid danger.

SAME.—Sufficient to Prove Substance of Issue.—In actions against carriers to recover for injuries resulting from negligence, it is sufficient to prove the substance of the issue.

EVIDENCE.—Preponderance.—Reasonable Probability of Truth.—Duty of Jury.—It is the duty of the jury, in a civil case, to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth.

PRACTICE.—Exclusion of Evidence.—Question as to, How Presented.—To present a question upon the exclusion of evidence, the particular evidence excluded must be specified with reasonable certainty in the motion for a new trial.

SAME.—Harmless Error.—It is only a material error which will authorize the reversal of a judgment.

INTERROGATORIES TO JURY.—Answer When there is no Evidence.—If there is no evidence upon a point covered by a special interrogatory propounded to the jury, they may so answer.

SAME.—Motion to Make Specific.—Venire de Novo.—The truth or falsity of answers to interrogatories is not presented by a motion to compel the jury to make them more specific, nor by a motion for a *venire de novo*.

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PLEADING.—*Scope and Tenor*.—The character of a pleading must be determined from its general scope and tenor.

From the Washington Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.

S. B. Voyles, *H. Morris* and *J. A. Zaring*, for appellee.

ELLIOTT, J.—The complaint of the appellee seeks a recovery for the death of Andrew Eichler, which is alleged to have been caused by the negligence of the appellant. It is charged that the appellee's intestate was a passenger on one of the appellant's trains; that because of the negligence of the appellant in constructing and maintaining the bridge across Blue river, the train went down into the river and Andrew Eichler was killed.

We agree with appellant's counsel that it must appear from the complaint that the death resulted from the negligent acts charged, for we understand it to be settled law that it must be shown that the negligence was the proximate cause of the injury. *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188); *City of Greencastle v. Martin*, 74 Ind. 449 (39 Am. R. 93); *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486, see p. 488; *Pittsburgh, etc., R. W. Co. v. Conn*, 104 Ind. 64.

While we agree with counsel as to the general rule of law, we can not concur with them as to the construction of the complaint, for, in our opinion, the complaint, although somewhat obscure, does charge that appellant's negligence was the proximate cause of the death of Andrew Eichler.

The widow of the intestate was permitted to testify, but, as all that is material in her testimony relates to matters subsequent to her husband's death, or else to matters which were open to the knowledge of all persons who knew the parties, no error was committed even if it were conceded that she was not competent to testify generally as to matters that occurred prior to his death. *Lamb v. Lamb*, 105 Ind. 456; *Floyd v. Miller*, 61 Ind. 224, 235.

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In the pocket of the appellee's intestate was found a pass reading thus:

"Void after December 31st, 1883.
"Countersigned:
"D. F. JENNINGS."

"LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY

"Trip Pass No. 911.

"LOUISVILLE, KY., Dec. 22, 1883.

"Pass J. M. WHALING from Louisville to Chicago.
Why issued—acc't C., M. & St. P. R'y. Good in one direction only, unless accompanied by a coupon. Good for one trip only until Feb'y 22d, 1884,

"When countersigned by

"D. F. JENNINGS, *Gen'l Freight Agt.*

"E. B. STAHLMAN, *Second Vice Pres.*

"Accepted subject to conditions on back hereof."

(Indorsed on back.)

"Not good on freight trains—not transferable. The person accepting and using this pass thereby assumes all risk of accident and damage to person or property. If presented by any other than the individual named hereon, the conductor will take up the pass and collect full fare.

"LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY.

"Dec. 22, 1883. Chicago."

There was also found in his pocket a conductor's check and about twenty dollars in money. These things were found by the coroner after Eichler's body was recovered from the river into which it had been carried by the fall of the bridge. No explanation was given by either party as to the manner in which Eichler came into possession of the pass, nor as to the circumstances under which it was issued, nor as to who J. M. Whaling was, or where he lived. The conductor of the train on which Eichler took passage, after stating that the train left Chicago for Louisville on the evening of the 23d of December, testified: "I went through it taking up tickets, coupons and passes, and collecting fares. This pass was handed to me by a man on the train that night at Chicago.

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I took a portion of the pass—the top part of it—and gave the pass back to the man who handed it to me. I do not know what became of the coupon; I turned it over to the auditor of the company. I did not know either Eichler or Whaling. If I had known it to be Eichler instead of Whaling I would have taken up the pass and collected his fare. The man who gave me this pass paid me no money and gave me no ticket for his fare.”

— We accept as good law the doctrine of the decided cases, that one who fraudulently attempts to ride on a non-transferable pass issued to another person, is not a passenger to whom the carrier owes a duty to carry safely. A person who enters a train on a pass to which he has no right, can not, therefore, maintain an action for injuries caused by the carrier's negligence. *Chicago, etc., R. R. Co. v. Michie*, 83 Ill. 427; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245; *Toledo, etc., R. W. Co. v. Beggs*, 85 Ill. 80 (28 Am. R. 613); *Brown v. Missouri, etc., R. W. Co.*, 64 Mo. 536. This rule is founded on sound principle, since it is a fundamental doctrine of the law, that one who is guilty of a fraud can not enforce any rights arising out of his own wrong. It is also in close agreement with the rule that a carrier owes no duty to an intruder. *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205).

— The difficult question is, whether the evidence can be justly said to prove that Eichler was attempting to fraudulently use the pass issued to Whaling. There is, as we have intimated, no evidence that he procured the pass fraudulently, or was attempting to travel on it, except such as is supplied by the fact that after his death the pass was found in his pocket. For anything that appears he may have been the mere custodian of it for Whaling. The presumption always is in favor of honesty and fair dealing, and he who asserts the contrary must prove it. A presumption, like a *prima facie* case, remains available to the party in whose favor it arises until overcome by countervailing evidence. *Bates v. Prickett*, 5

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Ind. 22; *Adams v. Slate*, 87 Ind. 573, see p. 575; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264. The presumption in favor of Eichler's good faith and honesty was not overcome; it can not, indeed, be justly said that there was any evidence impugning it, for the conductor's testimony does not show that Eichler did not pay his full fare, nor does it show that he was fraudulently in possession of the pass issued to Whaling. There are many ways in which he may have honestly and fairly obtained possession of the pass; it may have been entrusted to him by Whaling, or he may have found it. We can not consent to characterize an act as fraudulent from the single fact that on a dead man's body is found a pass issued to another person. If there were attendant circumstances making it probable that the pass had been wrongfully used, the case would be different, but here there are no such facts, for the conductor says that he did not know the man who presented the pass. It seems much more reasonable that the appellant who issued the pass should explain why and to whom it was issued, and secure the testimony of the man to whom it was given, or else show what had become of him, than to presume from the fact that it was found in a dead man's pocket, that it had been dishonestly obtained or fraudulently used. The appellant had the coupon in its possession, and if it was true that it had been dishonestly used, it could have produced it and given some evidence at least to prove that fact.

It is said by counsel that, "After the wreck, the conductor accounted for all the passengers by the tickets, passes and coupons taken up; that his report showed eight persons to be missing, among them the man supposed to be J. M. Whaling." The testimony of the conductor is that "eight persons were missing, among them was the man I supposed to be J. M. Whaling." We have carefully searched the record to ascertain, if possible, how many bodies were recovered, but we can find no evidence showing that more than two were recovered. We find evidence proving that Blue river was

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very high; that the body of Eichler was swept about two miles down stream, and the fair presumption is that Whaling's body was not recovered. This leads to the further presumption, since it is the one consistent with good faith and honesty on the part of Eichler, that Whaling was on the train and had himself used the pass. Nor is there anything unnatural or unreasonable in this inference, for it is not at all improbable that Whaling may have entrusted his pass to Eichler for safe-keeping. It is perfectly reasonable to infer that if Whaling was on the train he himself used his pass; any other inference would be a strained and unnatural one. At all events this inference is the one that best comports with the theory of honesty and good faith, and the jury did not do wrong in adopting it, for any other theory would require the presumption that Eichler had stolen the pass, or that both he and Whaling were guilty of fraud.

The inference, for it can not with justice or accuracy be called a presumption, arising from the fact of finding the pass in Eichler's pocket after his death, is a special one; while the presumption of good faith is a general one. The court may instruct the jury that the presumption is in favor of good faith and honesty, but it could not rightfully instruct, as matter of law, that the fact that the pass was found in Eichler's pocket created a presumption that it was fraudulently used, and this proves that the inference must give way before the general legal presumption. But if we grant that the fact that the pass was found in Eichler's pocket creates a presumption, and that there is a conflict of presumptions, still the one in favor of good faith is the stronger, and will break down the other.

In *Potter v. Titcomb*, 7 Maine, 302, 309, there was a conflict of presumptions, and it was held that a presumption in favor of good faith would outweigh a presumption of payment. Where a party is found in possession of a document, the presumption is that he came by it fairly. *Hazen v. Henry*, 6 Ark. 86. The general principle runs through all the law, that

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where the facts of a case are consistent both with honesty and dishonesty, the courts will adopt the construction which is in favor of honesty. *Greenwood v. Lowe*, 7 La. Ann. 197; *Bradish v. Bliss*, 35 Vt. 326. It can not, therefore, be justly held that the jury erred in acting upon the general presumption in favor of honesty and good faith, since a presumption, until overcome, makes a *prima facie* case.

The complaint, with great and, perhaps, unnecessary particularity, describes the negligence which it is alleged caused the death of Eichler, and it is contended that the evidence fails to prove the specific acts of negligence charged. We do not think the doctrine that matters of description must be strictly and fully proved applies to the allegations of negligence in actions against carriers to recover for injuries resulting from negligence. In such cases it is sufficient if the substance of the issue is proved.

It is sufficient to prove the substance of the issue as to the payment of fare, without proving specifically that it was paid in the precise manner and form alleged. The important question is as to the payment of fare as demanded by the carrier, and not as to the character of the payment. But in this instance there was evidence fully warranting the inference that the appellee's intestate had paid his fare in the manner and form described in the complaint. The conductor had recognized him as a passenger, and had given him a check, indicating that he was a passenger, and he had been carried for many hours and many miles as a passenger. The authorities go further than we are required to in this case, for, as stated by an author of a standard work upon carriers, "Every person being carried upon a public conveyance, usually employed in the carriage of passengers, is presumed to be lawfully upon it as a passenger." *Hutchinson Carriers*, section 554. Another author says: "It is said that payment of fare will be presumed to have been made according to the common course of business upon the route. And, although this has been

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questioned, it is certain that such an inference, as matter of fact, will be very obvious, in the case of passengers upon railroad trains, and we do not perceive any reasonable objection to the rule as one of presumption of fact which for its force must depend upon circumstances, to be judged of by the jury." Redf. Carriers, section 134.

The skill and care required of railway carriers of passengers, as is well known, are very great; they are required, as this court has said, to "exercise the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if an injury is caused thereby." *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228. This doctrine has often found approval in our decisions, and has often been stated by other courts in much stronger terms. *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371 (47 Am. R. 149); *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, see p. 356 (49 Am. R. 168). This principle, as the decided cases with much harmony affirm, applies to the machinery, track and bridges of the railway. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264. But, while the degree of care and skill required is very great, still the carrier is not an insurer of the safety of the passenger, and is not answerable for injuries resulting from an occurrence against which human foresight and prudence can not guard. If the accident is one which human care and skill could not foresee or guard against, there is no liability. Where, however, a passenger, rightfully on the train, is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence. This settled rule proceeds upon the theory that it is within the power of the carrier, and not within that of the passenger, to fully show the cause of the injury. *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392 (43 Am. Rep. 71); *Terre Haute, etc., R. R. Co. v. Buck*, *supra*, see p. 358; *Bedford, etc., R. R. Co. v. Rainbolt*, *supra*; *Cleveland, etc., R. R. Co. v. Newell*, *supra*.

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Applying to the case before us these settled principles, we do not think it can be said that the verdict is not supported by the evidence upon the question as to the manner in which the bridge was constructed and maintained, for there is evidence that there was negligence in this respect on the part of the appellant, and we can not say that either the presumption which the law creates in favor of the appellee, or the testimony adduced by him, was overcome by the evidence introduced by the appellant.

Where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it and ascertaining its condition, the railway carrier is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill. If it is apparent to those in charge of a train that the track and bridges have been made unsafe by tempests or floods, the trains must be run with a care proportioned to the known danger. If there is time and opportunity for inspecting and discovering the unsafe condition of a bridge after a great flood, and care and prudence require such an inspection, then the duty of making it, and, if the inspection reveals the unsafe condition of the structure, of warning approaching trains, rests upon the railway company. The duty of the company is to employ the highest degree of practical care to guard against accidents, and where its agents or officers have knowledge that a great storm or a great flood has probably made its track or bridges unsafe, it must, where there is reasonable time and opportunity, take measures to protect its passengers from injury. Whart. Neg., section 634; 2 Redf. Law of Railways, section 192; *Hardy v. North Carolina, etc., R. R. Co.*, 74 N. C. 734; *Great Western R. W. Co. v. Braid*, 1 Moore P. C. N. S. 101; *Railroad Co. v. Halloren*, 53 Texas, 46 (37 Am. R. 744).

The rule declared in such cases as *Pittsburg, etc., R. W. Co. v. Gilleland*, 56 Pa. St. 445, *Flori v. City of St. Louis*, 69 Mo. 341 (33 Am. R. 504), and *Livezey v. Philadelphia*,

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64 Pa. St. 106 (3 Am. R. 578), does not apply to an action by a passenger against the carrier, for, in those cases, the relation of carrier and passenger did not exist, and the rule is that a railway carrier owes a much higher duty to passengers than to land-owners along the line of its road.

The case of *Ellet v. St. Louis, etc., R. W. Co.*, 76 Mo. 518, is not in conflict with the views we have expressed; on the contrary, it is in harmony with them, for it was there said: "It is quite apparent from the foregoing statement of facts, that the death of Ellet resulted from a sudden and unknown weakening of the track of the defendant by an extraordinary and unprecedented rain storm." The decision in *Nashville, etc., R. R. Co. v. David*, 6 Heiskell, 261 (19 Am. R. 594), can hardly be considered as in point, as the rule respecting carriers of goods is more strict than that governing carriers of passengers, although the language there used applies here, but its application is against the appellant, for it was said: "The true rule should have been stated to be, that if the parties had any reason, in the situation the company occupied, to anticipate that such a flood was about to occur, then it was the duty of the company to use actively and energetically all means at its command, or that might reasonably be expected of a company engaged in their business to possess, to meet the emergency."

The cases cited by appellant are, therefore, far from maintaining that carriers are exculpated from liability in cases where there is reasonable time and opportunity to guard against the results of an extraordinary flood, and proper care and skill are not exercised. In the case before us, it can not be said that there is no evidence that the appellant was not negligent in omitting to take proper precautions to discover the unsafe condition of the bridge, and warn the train in which the appellee's intestate was a passenger. It appears in evidence that farmers in the vicinity, hours before the accident, had knowledge from the indications about them of the probability of a great flood; some of them remained up all

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night to guard against it, and some of the agents of the appellant were not far distant from the bridge, and might, it is fairly inferable from the evidence, have discovered its unsafe condition and given warning to approaching trains, for the evidence shows that the bridge was unsafe hours before the train reached it. Nor can we say that the evidence does not justly warrant the inference that those in charge of the train were informed by the appearance of the water about the bridge, that it was unsafe, and that, notwithstanding this information, they took the train upon it at a dangerous and improper speed.

Thus far, in following the line of counsel's argument, we have tacitly conceded that the bridge was safe as against an ordinary flood, but this concession can not be justly made, as there is evidence strongly tending to prove that the bridge was not so constructed as to resist even usual floods. The evidence shows that the bridge was sometimes covered with water in times of freshets, and such a bridge can not, as matter of law, be pronounced a safe one. Nor can it be said that the increased volume of water caused the bridge to give way, for the evidence fully warrants the conclusion that freshets no greater than those which had formerly swelled the river beyond its banks would have made it unsafe. We can not, therefore, assume, in the face of the verdict, that the bridge was sufficient as against ordinary floods, nor can we assume that the increase in the height of the water caused the bridge to weaken and give way. The evidence does not justify us in disregarding the finding of the jury upon this point, for, so far is it from having this effect, that it inclines us strongly to the opinion that the jury's conclusion upon this point was the only correct one. To the assistance of the evidence arises the presumption, of which we have already spoken, that the accident was due to the negligence of the carrier. In a case very like the present, the jury were instructed that, "Where the passenger is injured by any accident arising from a collision or defect in machinery, he is required,

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in the first place, to prove no more than the fact of the accident and the extent of his injury; that a *prima facie* case is thus made out, and the *onus* is cast upon the carrier to disprove negligence; that, in the case trying, the legal presumption was that the injuries to the plaintiff were caused by the negligence of the defendant, and that this presumption continued until a countervailing presumption of fact was established." In commenting upon the instructions, it was said: "Now, we must say, the able argument of the learned counsel to the contrary notwithstanding, that a better summary of the law governing cases of this kind could scarcely have been framed." *Philadelphia, etc., R. R. Co. v. Anderson*, 94 Pa. St. 351 (39 Am. Rep. 787). It was said in another case: "Nay, the mere happening of an injurious accident, raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist." *Laing v. Colder*, 8 Pa. St. 479. In the case of *Delaware, etc., R. R. Co. v. Napheys*, 90 Pa. St. 135, the court said: "A *prima facie* case of negligence is thus made out, and the *onus* is cast upon the carrier to disprove negligence." This presumption, combined with the facts developed by the evidence, gives the verdict of the jury upon the point under immediate discussion fair support, and a long and firmly settled rule forbids us from disturbing it.

Some minor questions require consideration. One of these grows out of the exclusion of the testimony of John C. Lawler. Mr. Lawler did testify as a witness, and as the specification in the motion for a new trial is the general one that the court erred in excluding his evidence, no question is presented for our consideration. A general specification is not sufficient; the particular testimony excluded must be specified with reasonable certainty. *McClain v. Jessup*, 76 Ind. 120; *Marsh v. Terrell*, 63 Ind. 363; *Coryell v. Stone*, 62 Ind. 307; *Grant v. Westfall*, 57 Ind. 121; *Ball v. Balfe*, 41 Ind. 221.

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Our cases recognize the doctrine that where there is no evidence upon a point covered by a special interrogatory propounded to the jury, they may so answer. *Maxwell v. Boyne*, 36 Ind. 120; *Gulick v. Connely*, 42 Ind. 134; *Rowell v. Klein*, 44 Ind. 290 (15 Am. R. 235); *Mitchell v. Robinson*, 80 Ind. 281 (41 Am. R. 812); *Williamson v. Yingling*, 80 Ind. 379. Under this rule the answers to all the material interrogatories were proper.

The third interrogatory is: "What did the deceased represent his name to be to said conductor?" and the answer was: "No evidence." Of this counsel say: "An inspection of the record will show this answer to be evasive and untrue—a mere subterfuge."

We have carefully studied the record and can not find that there is evidence that any representation whatever was made to the conductor, for we do not believe that the mere fact that the pass issued to Whaling was found in Eichler's pocket can be deemed evidence that he made any representation to the conductor.

The fourth interrogatory is: "Was the conductor deceived by such representation?" If no representation was made we can not perceive that the jury did wrong in answering that there was no evidence upon that point.

What we have said of these two interrogatories applies to the fifth, for it rests upon the same assumption that they do. The answer to the sixth interrogatory is perhaps wrong, for, according to the answer to the first, the answer should have been "No," but the error of the jury in this particular could not possibly have injured the appellant.

Where there is no material error, there can be no reversal. The answers to all the other interrogatories were proper, and the appellant has no cause to complain of them.

The truth or falsity of answers to interrogatories is not presented by a motion to compel the jury to make them more specific, nor is it presented by a motion for a *venire de novo*.

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It is obvious that the court can not direct the jury how they shall decide disputed questions of fact.

Judgment affirmed.

Filed June 17, 1886.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—An earnest and able petition for a rehearing has been filed, and it is thought proper to again discuss some of the questions argued.

We said in our former opinion, that even if it were conceded that the widow of Andrew Eichler was not a competent witness, no material error was committed in permitting her to testify, and we still adhere to that view; but we are prepared to go further, and hold that she was a competent witness, for the statute does not apply to cases of tort resulting in the death of the husband. Neither section 498 nor section 499 of the code applies to a case like this, for the widow is not a party to the record, nor is her interest adverse to the estate, and the case is not one between heirs. The case is not "founded on a contract with or demand against the ancestor," or "to obtain title to or possession of property, real or personal," but is an action to recover damages for a tort causing the ancestor's death.

The circumstances proved by the appellee show that Andrew Eichler was on the appellant's train, and was killed by the falling of the train into the river. It is not necessary in any case, civil or criminal, that the material facts should be established by direct evidence. Greenleaf thus states the rule which prevails in civil cases: "In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove." It is also said by this author, that it is the duty of the jury "to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth." 1 Greenl. Ev., section 13a. This rule has been often approved by this court. *Indianapolis, etc., R. R. Co. v. Collingwood,*

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71 Ind. 476; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, see p. 363 (49 Am. R. 168); *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143, see p. 147; *Evansville, etc., R. R. Co. v. McKee*, 99 Ind. 519, see p. 525 (50 Am. R. 102); *Union Mutual L. Ins. Co. v. Buchanan*, 100 Ind. 63, see p. 72; *Evansville, etc., R. R. Co. v. Mosier*, 101 Ind. 597; *Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70.

The reasonable probability and, indeed, the only fair inference, from the facts and circumstances established, is that Eichler was on the train which went down into Blue river. He was in Chicago, and was expected home in Louisville about the time of his death; his route was over the appellant's road; his body was found about one and one-half or two miles down stream; his name was on the tab of his shirt, and in his pocket, among other things, was a conductor's check, issued by the conductor of the train; bodies were seen washing down the river immediately after the train went down; the river was very high and the current swift; seven persons besides Eichler lost their lives by the disaster. When Eichler's body was taken from the water it was found to be badly mangled; the "head was," as one of the witnesses said, "caved in and his bowels torn out." Another witness says "the body was badly torn up, right leg broken, his hip was broken and his belly torn open;" timbers floated down stream from the bridge, displaced by the cars crashing through them.

These circumstances unmistakably show that Eichler was violently killed and horribly mangled by some means, and the most natural inference in the world is that he was killed by the train's plunging through an unsafe bridge, as were seven others who were on the train, and this supplies ground for inferring that he was on the train; but, in addition to this, are the other facts that he was in Chicago and expected home, and had a conductor's check in his pocket. There is not one particle of evidence tending to show that he was, or could have been, injured in any other way than by the train

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in which he was seated falling through the defective bridge; but it is the most natural and reasonable of inferences to conclude that he was mangled and killed by the fall of the train, which, running, as it was, at a high rate of speed upon the bridge, crushed it beneath its force and weight. That the body was found some distance from the bridge does not invalidate this inference, for it is in the highest degree probable that a body mangled as was Eichler's would have been carried down by a river swollen by a great freshet. It is indeed almost inconceivable that Eichler was killed in any other manner than by the train's plunging through the bridge and crushing him between the timbers or iron of the cars and the heavy beams and sills of the bridge, so that the evidence not only supports the hypothesis of the appellee, but goes very far towards excluding any other hypothesis, if, indeed, it does not go to the full extent of excluding every other.

We conclude, without doubt or hesitation, that the evidence shows that Eichler was on the train, and the authorities cited in our former opinion abundantly prove that one who is on a train used for carrying passengers is, in the absence of countervailing evidence, presumed to be rightfully there as a passenger.

The counsel assume as true, that the complaint is for a breach of contract, and there are some statements in it which possibly give some support to this assumption, but the complaint, judged, as all our cases agree it must be, by its general scope and tenor, is very plainly in tort, and the cause of action is the negligence of the appellant.

We do not think that the complaint assumes to state as a cause of action, that the death of appellee's intestate resulted from a breach of contract, and it is very evident that the appellant's counsel tried the case upon a theory very different from that now insisted on, which is that the action was based on a breach of contract. As the case was tried upon the theory that the cause of action alleged was the negligence of the appellant, that theory prevails here. *Carver*

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v. *Carver*, 97 Ind. 497. But we think it very clear that the complaint charges, as the cause of action, the tortious negligence of the appellant, and it was not necessary to do more than prove the appellant's duty, its negligent breach, and that the deceased was free from contributory negligence, for it is an elementary rule that it is sufficient if the substance of the issue be proved.

It is quite probable, so much so that the jury were authorized to infer it, that the deceased purchased a ticket at Chicago, for there is no evidence to the contrary, and the conductor testified that he did take up "tickets, passes and coupons." We say that it was fairly inferable that the deceased had a ticket, because as the authorities cited in our former opinion establish, one on a passenger train is presumed to be rightfully there as a passenger, and because the presumption is always in favor of honesty and fair dealing. Any other rule would work great hardship in such a case as this, where the lips of the passenger are closed in death, and where the ticket, if bought at all, was bought at a station in a great city, where many passengers purchase tickets and embark upon the trains of the railway company.

We do not deem it necessary or proper to again discuss the question of presumptions in favor of Eichler's honesty, further than to say that it was presumably in the power of the appellant to show who Whaling was, why the pass was issued to him, and what had become of him. As we said in our former opinion, the pass issued by the appellant showed to whom it was issued and on whose account, and no explanation at all was offered, nor was the part of the pass which the conductor testified that he took up given in evidence. We think these facts called upon the appellant to explain, and will not allow it to succeed solely on an inference, which it is claimed exists, that Eichler fraudulently procured and used the pass issued to Whaling.

Mr. Broom says: "Where a party has the means in his power of rebutting and explaining the evidence adduced

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against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him." Broom Legal Max. 939.

Petition overruled.

Filed Nov. 22, 1886.

 No. 12,336.

DEHART ET AL. v. APER.

NEW TRIAL.—*Newly Discovered Evidence.*—*Cumulative Evidence.*—Newly discovered evidence, which is merely cumulative to that adduced at the trial, will not authorize a new trial.

SAME.—*Conflicting Evidence in Support of.*—*Supreme Court.*—*Practice.*—Where the evidence offered in support of a motion for a new trial is conflicting, the decision of the trial court will not be reviewed on appeal.

From the Tippecanoe Superior Court.

B. W. Langdon, T. F. Gaylord and G. P. Haywood, for appellants.

J. F. McHugh and H. E. Ball, for appellee.

NIBLACK, J.—This was an action to recover damages for an injury done to the land of appellants by surface-water, coming, as was alleged, from the lands of appellee and flowing over and upon the land of appellants.

The substantial allegations of the complaint were, that appellants owned a certain lot number 116, in the town of Chauncey, Tippecanoe county, in this State; that appellee owned certain real estate in the same county, the southeast corner of which was adjacent to the northwest corner of appellants' lot; that south of appellee's land, and adjacent thereto, and next to appellants' lot, and contiguous thereto, was, and is lot No. 121, in said town of Chauncey, and that on said lot 121 was a large natural reservoir, depression or basin covering about ten acres; that between lots 116 and 121 there was an unimproved street, the north end of which

107	400
120	588
107	400
145	106
145	672
107	400
154	588
107	400
165	161

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terminated at the southeast corner of appellee's land; that appellee's land, except the east side, was low, and was a natural basin; that the reservoir on lot 121 was a continuance of the basin on appellee's land; that the surface of appellants' land was lower than appellee's land; that appellee had obstructed the flow of water from his land to lot 121, and to drain his own land had dug, permitted, or caused to be dug, a ditch to the southeast corner of his land, and thence on to the improved street in the town of Chauncey; that after the melting of the snow, and after and during the heavy rains of summer, the water flowed in torrents from the basin on appellee's land into said ditch, and on to and over appellants' land, and the water, because of an abrupt descent of forty feet on appellants' land, gathered force and momentum as it descended, and had carried away soil, gravel and sod, and had washed out trees, shrubbery, etc., to appellants' damage.

The cause was twice tried. At the first trial the jury failed to agree upon a verdict. The second trial resulted in a verdict and judgment for the appellee. Before the rendition of the judgment a motion for a new trial was interposed and overruled. One of the causes assigned for a new trial was newly discovered evidence, and the only contention here is upon the alleged sufficiency of the showing made by the appellants in support of that cause for a new trial.

The appellee, testifying as a witness, denied having constructed, or having authorized the construction of, the ditch complained of. There was nevertheless evidence tending to prove that the ditch was made by persons who had but a short time before been seen working in the appellee's field near by, and who were seemingly engaged as workmen upon the appellee's lands described in the complaint. Other circumstances were adduced, and relied upon, as tending to show that the ditch was dug by the appellee's employees, with his knowledge and at least implied consent.

Both of the appellants filed affidavits alleging that upon another trial they could prove additional and material facts

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by one Evans, a newly discovered witness. They also, at the same time, filed the affidavit of Evans, in which he stated, amongst other things, that he worked as a farm hand for the appellee during the years 1875 and 1876; "that, during the spring and summer of said year 1875, said defendant by himself, and this affiant for him, constructed" the ditch in question. The appellee then procured an additional affidavit from Evans, and filed it as a counter-affidavit to the one he had previously made. In this latter affidavit Evans withdrew some of his previous statements and modified others. Among others, he withdrew his former statement that the appellee had constructed the ditch in controversy. He also intimated that his first affidavit had been obtained from him by undue means, and claimed that he had been induced to sign it in ignorance of many of its statements.

William M. DeHart, one of the plaintiffs, and the husband of Caroline V. DeHart, his co-plaintiff, filed his additional affidavit, testifying to admissions which Evans had since made in material conflict with many of the allegations of his second affidavit, and stating that, notwithstanding such admissions, Evans had declined to sign any other or further affidavit in the premises.

Upon the facts thus stated, the appellants moved that Evans be summoned to appear in court and to testify orally concerning the matters embraced in both of his affidavits. Their motion was granted, and, over the objection of the appellee, Evans was examined and testified orally concerning the matters in question. He modified and corrected some of his previous statements on both sides, and explained more at length. He admitted that he had assisted in the construction of the ditch referred to in both of his affidavits, but said that he rendered that assistance only at the request of two of his co-employees on the appellants' farm; that one of these two co-employees was a son of the appellee, who seemed to be a managing man in the absence of his father; that the ditch, as it was originally constructed, was a rather small affair, and

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that he, Evans, did not know that the appellee had any knowledge of its construction when it was made.

There were other questions involved at the trial besides the inquiry as to the authority under which the ditch referred to was made. If, therefore, the question for decision in this case rested upon the statements of Evans contained in his first affidavit alone, we would scarcely feel justified in holding that the testimony of Evans would probably produce a different result upon another trial. 3 Graham and Waterman New Trials, 1093, *et seq.* But, accepting Evans' oral testimony as his last and true statement of what he would swear to upon a new trial, we feel constrained to hold that the proposed evidence would be only cumulative to that which was given at the former trial. It would afford only circumstantial evidence, tending to establish the appellee's responsibility for the construction of the ditch, and, as has been seen, there was circumstantial evidence of a similar character at the trial, tending to establish the appellee's responsibility in that respect. It would, therefore, only be additional "evidence of the same kind to the same point." *Houston v. Bruner*, 39 Ind. 376; *Shirel v. Baxter*, 71 Ind. 352; *Lefever v. Johnson*, 79 Ind. 554; *Buskirk Pr.* 242; *Hines v. Driver*, 100 Ind. 315.

But, waiving all question as to the cumulative character of the proposed newly discovered evidence as it was foreshadowed by the oral testimony of Evans, the case presents a view which is fatal to this appeal.

The evidence submitted as above by the parties respectively was conflicting, and hence its weight as evidence became a question for the decision of the court to which it was addressed. Decisions thus made upon the mere weight of conflicting evidence will not be reviewed by this court. *Harris v. Rupel*, 14 Ind. 209; *Long v. State*, 95 Ind. 481; *Epps v. State*, 102 Ind. 539; *Shular v. State*, 105 Ind. 289.

The judgment is affirmed, with costs.

Filed Sept. 23, 1886.

The Lake Erie and Western Railway Company v. Griffin et al.

No. 12,503.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY
v. GRIFFIN ET AL.

RAILROAD.—*Judicial Sale of Property and Franchises.—Liability of New Corporation for Debts of Predecessor.*—Ordinarily, where a new railroad corporation is organized by the purchasers, at a judicial sale, of the property, rights and franchises of a previously existing railroad company, it does not become liable at law for the payment of the debts of its predecessor.

SAME.—*Use of Land Appropriated by Old Company.—Compensation to Owner.—Value of Land.—Conclusiveness of Judgment in Appropriation Proceedings.*—Where, however, a new railroad corporation, upon succeeding to the property, rights and franchises of its predecessor, elects to adopt an appropriation of land, made by the old company, by entering upon and using and occupying the same for the purposes of its road, to the entire exclusion of the owner, it is bound to make compensation to the owner, and where, in the appropriation proceedings, the value of the land has been determined by the judgment of a court of competent jurisdiction, the new corporation is concluded by the judgment upon the question of value.

SAME.—*Abandoning Use of Appropriated Land will not Defeat Payment Therefor.*—In such case, where suit is brought against the new corporation by the owner of the land to recover its adjudged value, the defendant can not escape payment by abandoning its use and occupancy for railroad purposes, and by ceasing to exclude the plaintiff from its use and enjoyment.

SUPREME COURT.—*Findings in Suits in Equity Considered as in Other Cases.*—The Supreme Court, under the existing civil code, is bound to give the same respect to the finding of the trial court in a suit in equity that is given to the verdict of a jury or the finding of a court in an action at law.

PRACTICE.—*Admission of Evidence.—Harmless Error.*—The erroneous admission of immaterial and harmless evidence will not authorize the reversal of the judgment.

From the Carroll Circuit Court.

H. W. Chase, F. S. Chase and F. W. Chase, for appellant.

G. O. Behm, A. O. Behm, J. R. Coffroth and S. A. Huff, for appellees.

Howk, C. J.—This case is now here for the second time. The opinion and decision of this court, on the former appeal, is reported under the title of *Lake Erie, etc., R. W. Co. v.*

107	464
125	21
107	464
122	91
122	478
107	464
135	98
107	464
150	102
150	146
107	464
165	92

The Lake Erie and Western Railway Company v. Griffin *et al.*

Griffin, 92 Ind. 487. On the former appeal we held that the second paragraph of appellees' complaint stated an equitable cause of action against the appellant, and we reversed the judgment theretofore rendered herein, because the court had erred, in our opinion, in submitting the cause to a jury for trial. In our former opinion, we gave a full summary of the facts stated in the second paragraph of appellees' complaint, to which we refer without repeating it here, as we do not find that any change was made in any of the pleadings after the cause was remanded. The cause was tried by the court, and the court made a special finding of the facts, and thereon stated its conclusions of law. Over the exceptions of both parties to its conclusions of law, and over appellants' motions for a *venire de novo*, and for a new trial, the court rendered a decree in favor of appellees and against the appellants, in accordance with such conclusions of law.

The first error complained of here, on behalf of the appellant, is the overruling of its exceptions to the court's conclusions of law upon its special finding of facts.

The facts found by the court were, in substance, as follows: The Lake Erie and Western Railway Company and the Lafayette, Muncie and Bloomington Railroad Company, defendants hereto, are respectively railroad corporations of the State of Indiana, organized under and pursuant to the laws of such State. The plaintiffs herein were, on the 24th day of October, 1875, and for many years prior thereto, the owners in fee simple of thirty-seven feet off of the west end of lot No. 1, in O. L. Clark's addition to the city of Lafayette, which west end of such lot abuts on an alley twelve feet wide. At and prior to the time aforesaid, the Lafayette, Muncie and Bloomington Railroad Company owned and operated a line of railroad along and contiguous to the above described real estate, and, on the day last named, appropriated such real estate for the use of its track, and necessary side-tracks, water stations and depot; and, on said day, it filed its act of appro-

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priation in the clerk's office of Tippecanoe county, and appraisers were appointed by the Tippecanoe Circuit Court, who, on December 14th, 1875, made and filed in such clerk's office their report, awarding the plaintiffs the sum of \$2,400 as their damages, by reason of such act of appropriation. The plaintiffs excepted to such report and appealed therefrom to the Tippecanoe Circuit Court, and the venue of the cause was changed to the Carroll Circuit Court, where a trial was had and a judgment was rendered on May 16th, 1877, in favor of the plaintiffs, for \$5,008.66 damages, and \$80.60 costs, which judgment remained unpaid.

Prior to the filing of such act of appropriation, the Lafayette, Muncie and Bloomington Railroad Company had executed two mortgages upon its railroad property, one for \$666,000 and the other for \$1,750,000. These mortgages covered all the railroad property of such company, of every kind and description, and the first one covered all its property in the city of Lafayette, contiguous to plaintiff's lot. The one for \$666,000 extended from the Illinois State line to the Toledo, Wabash and Western Railroad, in Lafayette, covering what was called the Western Division, and the other mortgage covered the property from Lafayette to Muncie, being what was called the Eastern Division. On the 1st day of February, 1879, decrees foreclosing both of such mortgages were rendered by the United States Circuit Court, for the district of Indiana, against the Lafayette, Muncie and Bloomington Railroad Company, under which a commissioner, appointed for that purpose, sold all the franchises, rights, property and effects of such company to certain persons as a bond-holders' committee for \$1,413,000, leaving a large balance of such decrees unpaid. A deed was made to such purchasers on April 28th, 1879, and they formed a new corporation called the Muncie and State Line Company, with a capital of \$600,000, to whom they conveyed such railroad with its rights and franchises, on the 29th of April, 1879. Afterwards, on July 24th, 1879, the Muncie and State Line

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Railroad Company consolidated with the Lafayette, Bloomington and Mississippi Railroad Company, under the name of the Lafayette, Bloomington and Muncie Railroad Company, which last named company owned and operated a line of railroad from Bloomington, Illinois, to Muncie, Indiana, a distance of two hundred miles.

On the 19th of December, 1879, the last named company consolidated with the Lake Erie and Western Railway Company, of Ohio and Indiana, owning and operating a line of railroad from said Muncie to Fremont, Ohio, and since extended to Sandusky, Ohio; which last mentioned consolidated company assumed the corporate name of the Lake Erie and Western Railway Company, and is the appellant in this cause. The defendant, the Lafayette, Muncie and Bloomington Railroad Company, after such condemnation of appellees' real estate, entered upon and occupied the same until the succession of appellant, the Lake Erie and Western Railway Company, to the rights, property and franchises of such first named company, through the sale, organization and consolidation hereinbefore mentioned, and this occupancy and possession were such at the commencement of this suit as to exclude the appellees from the use and enjoyment of the same. The exact date, when such occupancy and possession commenced by defendants began, can not be determined from the evidence. The Lafayette, Muncie and Bloomington Railroad Company was, at the time of the rendition of such judgment against it in favor of the appellees, insolvent, and had been since, and still was insolvent.

On the 25th day of January, 1881, the appellees executed a mortgage to John R. Coffroth on the property condemned as aforesaid to secure several promissory notes executed by them to Coffroth, amounting in the aggregate to the sum of \$600, which mortgage was duly recorded in the recorder's office of Tippecanoe county, and became a valid lien upon the appellees' interests in such real estate. Such mortgage was due and unpaid. One of the plaintiffs, John Griffin, had

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died since the commencement of this suit intestate, and his co-plaintiffs took by inheritance all his interest in such real estate and in the judgment rendered in the condemnation proceedings.

Upon the foregoing facts the court stated the following conclusions of law :

" The Lake Erie and Western Railway Company has elected to adopt the original appropriation of the plaintiffs' said land, and, having adopted such appropriation, it is bound to make compensation to the plaintiffs for the same.

" 2. The said judgment in the Carroll Circuit Court for \$5,008.66, and \$80.60 costs, shall be taken as the value of the land so appropriated.

" 3. As the plaintiffs have, since said condemnation proceedings, executed the said mortgage upon said land, whereby they have not been in a condition to give the defendants, or either of them, an unencumbered title to such land, and could not, after the execution of such mortgage, legally demand the payment of said judgment, they should be denied interest upon the said sum of \$5,089.26.

" 4. The defendant, the Lake Erie and Western Railway Company, should pay the clerk of the Carroll Circuit Court, for the use of the plaintiffs, within 60 days from this date, the sum of \$5,089.26 ; and out of such sum the clerk of this court shall pay and satisfy said mortgage, and the residue pay to the plaintiffs, or their attorneys. I further find that the defendants should pay and satisfy the costs of this suit.

(Signed) " M. WINFIELD, Judge *pro tem.*"

In discussing the alleged error of the trial court in overruling appellant's exceptions to the court's conclusions of law, its counsel say : " The conclusions of law (1) that the appellant is bound to make compensation to the appellees for their land, (2) that the judgment in their favor, against the L., M. & B. R. R. Co., the predecessor of the appellant, rendered May 16th, 1877, shall be taken as the value of the land, and (3)

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that the appellant should pay the principal of such judgment, to wit, \$5,089.26, within 60 days, are erroneous."

It is claimed by appellant's counsel, that "the findings of facts contain nothing showing that the appellant has ever used or occupied the appellees' land." This claim of counsel, we think, is not supported by, but is in direct conflict with, the special finding of facts. The court found specially, as we have seen, that the Lafayette, Muncie and Bloomington Railroad Company, after its appropriation of appellees' real estate, entered upon and occupied the same until the succession of appellant to its rights, property and franchises, and that said occupancy and possession were such, at the commencement of this suit, as to exclude the appellees from the use and enjoyment of such real estate. It was further found, that appellant succeeded to the rights, property and franchises of said Lafayette, Muncie and Bloomington Railroad Company, on the 24th day of July, 1879, and thereafter owned and operated the line of railroad along and contiguous to appellees' real estate, until the commencement of this suit, on the 19th day of May, 1882; and that, on the day last named, the occupancy and possession of such real estate "by defendants" (of whom appellant was one) were such as to exclude the appellees from the use and enjoyment thereof.

In the second paragraph of their complaint, the appellees averred that, upon its succession to the rights and franchises of the former corporation, the appellant entered upon, used and occupied the premises condemned by its predecessor, and from thence until the commencement of this suit had continued to occupy and use such premises. On the former appeal of this cause, we held that if this averment were true, it showed the appellant's election to adopt the original appropriation of appellees' premises, by its entry upon, use and occupation of such premises for the purposes of its railroad. We there said: "In such case, the appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, having adopted and ratified the

original appropriation, it is bound in equity and good conscience to make compensation. For the right of the appellees to compensation for their property is protected by the Constitution, and it will not do to say that their unsatisfied judgment against the old insolvent corporation affords them any just compensation. The maxim applies, *qui sentit commodum, sentire debet et onus.*"

The facts specially found by the court fairly sustain, we think, the averments of the second paragraph of appellees' complaint; and, therefore, it must be held, in accordance with our opinion on the former appeal of this cause, that the court did not err in its conclusion of law, that appellant was bound to make compensation to the appellees for their real estate. By its exceptions to the conclusions of law, the appellant admitted, so far as the alleged error now under consideration is concerned, that the facts of the case were fully and correctly found by the court, and said that, upon those facts, the court had erred in its conclusions of law. This is settled by our decisions. *Dodge v. Pope*, 93 Ind. 480; *Fairbanks v. Meyers*, 98 Ind. 92; *Helms v. Wagner*, 102 Ind. 385.

The next error complained of, on behalf of appellant, is the overruling of its motion for a *venire de novo*. It is said that "the findings of facts are too vague and indefinite to justify any conclusion of law thereon against the appellant." We do not think so. Fairly construed, there is no uncertainty in the special finding of facts, and the facts found fully justify the court's conclusions of law.

Under the alleged error of the court, in overruling appellant's motion for a new trial, it is first insisted by its counsel, that the damages assessed were excessive. Counsel say that there was no evidence of the appropriation of appellees' land by the appellant, and none of the value of such land, except the judgment rendered in May, 1877, in favor of appellees and against appellant's predecessor, the Lafayette, Muncie and Bloomington Railroad Company, in its proceeding to appropriate such land, to which proceedings

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and judgment appellant was not a party. It is not claimed that such judgment was not competent evidence on the trial of this cause; but it is claimed that it was not sufficient evidence, as against the appellant, of the value of appellees' land. It is said that appellant was not bound by such judgment, because it was a stranger to the record, and, in truth, was not organized or in being at the time the judgment was rendered. Ordinarily, no doubt, where a new railroad corporation is organized by the purchasers, at a judicial sale, of the property, rights and franchises of a previously existing railroad company, such new corporation does not become liable at law for the payment of the debts of its predecessor, unless it has assumed the payment of such debts. Section 3947, R. S. 1881.

But, in equity, a different rule applies. Where, as in this case, upon a hearing had, a court of equity finds that the new railroad corporation, upon its succession to the property, rights and franchises of its predecessor, had elected to adopt an appropriation of land, made by the old company, by its entry upon such land, and by its continued use and occupation thereof, for the purposes of its railroad, to the entire exclusion of the owners of the land from the use and enjoyment thereof, and that, in such appropriation proceedings, the value of such land so appropriated had been ascertained and determined by the judgment of a court of competent jurisdiction, it must be held, we think, that the new railroad corporation is bound and concluded by such judgment, upon the question of the value of the land so appropriated. Appellant's right to use and occupy the appellees' land, in the manner found by the court, can only be derived through the appropriation proceedings, instituted by its predecessor, the Lafayette, Muncie and Bloomington Railroad Company; and upon the fact, found by the court, that appellant's occupancy and possession of appellees' land, at the commencement of this suit, were such as to exclude them from the use and enjoyment thereof, appellant was bound by the amount of the judgment

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in such appropriation proceedings, and the damages assessed herein were not excessive.

But it is earnestly insisted by appellant's counsel, and was assigned as cause for a new trial or hearing, that the findings of facts were not sustained by sufficient evidence. Counsel preface their argument upon this cause for a new trial with this inquiry: "What rule shall govern this court upon this proposition?" It was formerly held that, in a chancery cause, this court would not feel bound to respect the finding of the circuit court, as it would the verdict of a jury or the finding of a court at law. "Having all the evidence upon which the court below acted," this court said, "we will weigh it and draw our own conclusions." *Egbert v. Rush*, 7 Ind. 706. At the time the case cited was decided below, in October, 1848, the evidence in chancery causes was submitted to the circuit court, upon final hearing, in the form of the depositions of the witnesses taken out of court, and the circuit judge had no better opportunities or facilities for determining the credibility of the different witnesses than the judges of this court. Now, however, under our civil code, the evidence in all causes, whether at law or in equity, may be heard in open court before the judge thereof. We know of no reason, therefore, for holding now that we are not bound to give the same respect to the finding of the trial court, in a suit in equity, that we have always given to the verdict of a jury, or the finding of a court, in an action at law.

But this question is not now an open one in this court. In *Miller v. Evansville Nat'l Bank*, 99 Ind. 272, in commenting upon the old rule of this court of weighing the evidence in chancery cases, it is said: "But practice demonstrated that this rule was of uncertain enforcement; and it is a well known fact that the judge who saw the witnesses, heard them testify, and observed their demeanor on the witness stand, was much better enabled to weigh the evidence and come to a correct conclusion than this court could possibly be by only seeing the record of the evidence, which is seldom full and

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frequently imperfect. From these considerations, the rule is now well established that where the evidence fairly tends to support the verdict or finding, it will not be disturbed by this court, and this rule applies to causes in the nature of chancery suits, the same as actions at law." So, in *State, ex rel., v. Wasson*, 99 Ind. 261, the court said: "In chancery cases not triable by a jury, the ancient practice of having the evidence taken before a master commissioner, and brought before the court upon paper, no longer prevails. The court trying the cause now hears the testimony from the mouths of living witnesses, and has every opportunity to test the weight of the evidence that judges trying causes as a jury in the old law court had, and his findings on questions of fact should no more be disturbed on appeal than the findings of fact made by a judge upon the trial of a case at law, and so this court has expressly decided. *Pence v. Garrison*, 93 Ind. 345."

We need not extend our opinion, in the case under consideration, by setting out or commenting upon the evidence appearing in the record. It will suffice for us to say, as we think we may safely do, that the evidence fairly tends to sustain the special findings of facts, on every material point. In such a case, as we have often decided, we will not disturb the findings of the trial court, nor reverse its judgment and decree, upon what might seem to be the weight of the evidence. The reasons for this rule of decision have been given so often, in our reported cases, that we need not repeat them here. We adhere tenaciously to this rule in all cases, whether at law or in equity. *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Hayden v. Cretcher*, 75 Ind. 108.

It is claimed by appellant's counsel that the trial court erred in admitting the evidence of certain witnesses to the effect that the appellees' lot was used by draymen, hackmen, express-wagon and omnibus drivers, etc., when visiting trains and cars on appellant's railroad, etc. The evidence was competent we think, as the use of such lot was the subject of in-

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quiry. The value of the evidence depended upon how far it might be shown that such use of the lot was authorized by appellant, or necessary to the convenient despatch of its daily traffic in freight and passengers. If no such showing was made, the evidence was immaterial and harmless; otherwise it was material. Even if the admission of such evidence were erroneous, it would not authorize a reversal of the judgment.

Finally, appellant's counsel insist that the court erred in overruling its motion for an alternative judgment herein. We are of opinion, however, that the case made by the special findings of facts, and the court's conclusions of law thereon, was not a case wherein the appellant could, in equity and good conscience, be permitted to escape the payment of the value of appellees' lot, as found and adjudged by the court, by merely abandoning its use and occupancy of such lot, for the purposes of its railroad, and by ceasing to exclude appellees from the use and enjoyment of such lot. *City of Lafayette v. Shultz*, 44 Ind. 97; *Kimball v. City of Rockland*, 71 Maine, 137; *In Re Rhinebeck, etc., R. R. Co.*, 67 N. Y. 242.

From our examination of the record of this cause, we are impressed with the opinion that the merits of this cause have been fairly tried and a just determination had, in the court below, fair and equitable to the parties on both sides, of which neither ought to complain. In such a case we can not reverse the judgment.

The judgment is affirmed, with costs.

Filed Sept. 23, 1886.

387 474
131 527

No. 12,421.

MOORE v. HARLAND ET AL.

SUPREME COURT.—*What Errors Not Available.*—*Practice.*—Questions not presented to the trial court can not be made available on appeal.

The Town of Rushville v. Adams.

SAME.—*Sufficiency of Evidence.*—Where there is evidence sustaining the finding of the court, it will not be disturbed.

From the Clinton Circuit Court.

J. Claybaugh and *G. Sexson*, for appellant.

S. Vanton, for appellees.

ELLIOTT, J.—It is urged by appellant's counsel that an error was committed by the trial court in permitting an instrument of writing to be introduced in evidence, but as the introduction of this evidence was not made one of the causes for a new trial, it is not properly before us for consideration. It is well settled that questions not presented to the lower court can not be made available on appeal.

It is also insisted that the assessment was erroneous, but we can not reverse the judgment upon this ground. The question was one of fact, and as there is evidence sustaining the finding of the court, it can not be disturbed. There is, it is true, much conflict in the evidence, but this court will not attempt to determine where the preponderance is.

Judgment affirmed.

Filed Sept. 23, 1886.

No. 10,502.

THE TOWN OF RUSHVILLE v. ADAMS.

NEGLIGENCE.—*Towns and Cities.*—*Permitting Objects Calculated to Frighten Horses to Remain on Street.*—Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses, of ordinary gentleness, at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed, and to remain upon the street.

SAME.—*Complaint.*—*Demurrer.*—*Motion to Make Specific.*—*Practice.*—Where the averments in the complaint in regard to negligence are not sufficiently specific, the objection must be reached by motion to make more specific, and not by demurrer for want of facts.

107	475
127	475
129	475
107	475
131	224
107	475
140	308
142	475
143	651
143	692
107	475
146	566
107	475
165	580
107	475
167	340
167	341
167	342
167	522

The Town of Rushville v. Adams.

SAME.—A general averment that the injury complained of was not caused by any negligence on the part of the plaintiff, but was caused wholly by the negligence of the defendant, a town, in permitting a person to carry on the business of making candy on the street, makes the complaint good as against a demurrer for want of facts.

INSTRUCTIONS TO JURY.—*Will be Considered as a Whole.*—*Reversal of Judgment.*—If the instructions, considered as a whole, put the case fairly before the jury, the judgment will not be reversed because one, taken alone, may not be sufficiently full.

From the Rush Circuit Court.

W. A. Cullen, B. L. Smith, J. J. Spann and J. Q. Thomas,
for appellant.

C. Cambern and T. J. Newkirk, for appellee.

ZOLLARS, J.—Appellee charged in her complaint, that the town licensed, and with knowledge permitted a person to carry on the business of manufacturing candy on one of the streets, and in said business “to use a tripod supporting a vessel containing syrup, which was boiled and manufactured into candy by means of fire built under the vessel;” that she and her husband were driving on the street, when the horse became frightened at the fire and ran away, throwing them out, and injuring her; that the injury was not caused by any negligence or carelessness on her part, but was caused wholly by the negligence of the town in permitting said person to maintain and carry on the said business.

Counsel for appellant urge three principal objections to the complaint. Assuming that appellee’s husband was driving the horse, the first is that there is no averment that he was free from negligence contributing to the injury.

Without deciding in what respect, if any, the husband’s negligence might affect the rights of appellee, it is sufficient here to say that it in no way appears from the complaint that he was driving the horse.

The second is, that as the buggy did not come in contact with the tripod, or any obstruction on or defect in the street, the town is not liable; in other words, that cities and towns

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are not liable for injuries resulting alone from the fright of horses at objects upon the streets, no matter what may be their character, and notwithstanding that the city, with knowledge, may have allowed them to remain upon the streets for an unreasonable length of time, or may have granted permission for placing and maintaining them there.

We do not understand that cities and towns are entitled to such immunity from liability. The duty rests upon such corporation to keep their streets in a safe condition, and free from all obstructions that may seriously interfere with travel, and thus result in injury to travellers. This duty relates not only to defects in the roadway, and objects thereon against which vehicles may be wrecked, but also extends the liability to injuries from falling awnings, ice and snow, and to injuries resulting from the fright of horses, of ordinary gentleness, at objects upon the streets naturally calculated, and which may reasonably be expected, to produce such fright. It can not be said, with reason, that streets in which obstructions are suffered to be placed and remain, which, by their appearance, are calculated to frighten such horses, are in a reasonably safe condition. The purpose of the law is to secure to the public safe highways. As said in the case of *Morse v. Town of Richmond*, 41 Vt. 435 (8 Am. L. Reg. n. s. 81), "That purpose may be as effectually defeated by an obstruction which impedes travel by its frightful appearance as by one which, if it is hit, will be an obstacle to the secure passage of the wheels of a carriage." And, as said in the case of *Bartlett v. Hooksett*, 48 N. H. 18, "Objects calculated to frighten horses would often be far more dangerous, and much less easily guarded against by the traveller, than many obstructions with which he comes in actual contact or collision."

In the case of *Foshay v. Town of Glen Haven*, 25 Wis. 288 (3 Am. R. 73), it was said: "We adopt upon this subject the rule established by the Supreme Courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway, naturally calculated to frighten horses of ordi-

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nary gentleness, may constitute such deficiencies in the way as to render the town liable, even though so far removed from the travelled path as to avoid all danger of collision."

Other cases to the same effect might be cited. In our judgment, reason, and the better considered cases, unite in requiring a holding that cities and towns should be held liable for injuries resulting from the fright of horses, of ordinary gentleness, at objects naturally calculated to frighten such horses, and which the corporation has negligently placed, or permitted to be placed, and remain upon the streets.

In order to render the corporation liable in such cases, it must, in some way, be made to appear that the object or obstruction was one naturally calculated to frighten horses of ordinary gentleness, and that the horse frightened was of such a character.

The third objection to the complaint, urged by appellant's counsel, is, that these facts are not sufficiently made to appear by its averments.

The complaint is not as definite and specific as the rules of good pleading would require, and if the question were before us upon the overruling of a motion below to have the complaint made more certain and specific, we should feel constrained to reverse the judgment. It has often been held by this court, that where the averments in regard to negligence are not sufficiently clear and specific, the objection is to be reached by a motion to have the complaint made more specific, and can not be reached by a demurrer for want of facts. *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160, and cases there cited; *Louisville, etc., R. W. Co. v. Kriming*, 87 Ind. 351, and cases there cited.

The general averment in the complaint before us, that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy on the street, we think, makes the complaint good as against the demurrer for

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want of facts. *Cleveland, etc., R. W. Co. v. Wynant, supra; Louisville, etc., R. W. Co. v. Kriming, supra.*

The evidence makes it very clear that the town authorities had knowledge of the fact that portions of the sidewalk and gutter were occupied by the person manufacturing candy, and that he had so occupied them for quite a number of days prior to appellee's injury, and that they made no effort to remove the obstruction, but affirmatively acquiesced in its continuance.

The syrup was heated by means of a fire produced by gasoline. As the horse, driven by appellee and her husband, came opposite, the pan or basin containing the syrup was lifted from the fire, which caused it to flash upwards. The jury having found that the fire, as thus used, was naturally calculated to frighten horses of ordinary gentleness, and that the horse was of that character, and that there was no negligence in the management and driving of the horse upon and along the street, we can not disturb the verdict upon the weight of the evidence. There is some conflict in the evidence as to the character of the horse, but this court can not settle that conflict against the finding of the jury.

The instructions asked by appellant were upon the theory that the town was not liable unless the vehicle came in contact with some defect or obstruction upon the street, and hence were properly refused.

The court's instruction to the jury, that if they should find the material averments of the complaint to have been proven, they should find for appellee, was too indefinite, as applied to this case. But in subsequent instructions, they were charged that in order that the plaintiff might recover, it must appear from the evidence that the horse was one of ordinary gentleness, and that the apparatus and fire used by the manufacturer of candy were naturally calculated to frighten such a horse.

In a civil action, the instructions are to be considered as a whole, and if, thus considered, they put the case fairly and

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intelligently before the jury, the judgment will not be reversed because any one of them, taken alone, might not be sufficiently full. *Union Mutual Life Ins. Co. v. Buchanan*, 100 Ind. 63 (74).

We have examined all of the questions discussed by appellant's counsel, and while the case in some of its features is close upon the margin, we find no error that would justify this court in reversing the judgment.

Judgment affirmed, with costs.

Filed Sept. 23, 1886.

No. 12,686.

THE BLOOMFIELD RAILROAD COMPANY v. VAN SLIKE.

PLEADING.—*Complaint.—Sufficiency of.*—A complaint, showing a cause of action, will repel a demurrer although it may not entitle the plaintiff to all the relief prayed.

SAME.—*Judgment Resting on Good Paragraphs.*—Where the record on appeal affirmatively shows that the judgment rests on two good paragraphs of complaint, it is immaterial whether a third is, or is not, sufficient.

PRACTICE.—*Agreement as to Question Presented.—Appeal.*—Where parties, by an agreement entered of record, definitely submit a single question to the trial court, they can not on appeal present any other.

RAILROAD.—*Appropriation of Land.—Receiver.—Right of Action.*—Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the corporation, and, after the discharge of the receiver, the corporation resumes control of the railroad, and retains possession of and uses the land, the owner can maintain an action to recover and for damages.

SAME.—*Notice by Receiver to File Claims no Bar.*—Such a right of action can not be barred by the notice of the receiver, requiring creditors to present their claims against the corporation.

From the Greene Circuit Court.

J. T. Hays, H. J. Hays and P. H. Blue, for appellant.

A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellee.

107	480
126	91
107	480
136	540
107	480
139	278
107	480
143	440
107	480
147	572

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ELLIOTT, J.—The appellee's complaint is in three paragraphs; the first and second seek to recover for injuries to real estate by the construction of a railroad, and the third seeks to recover possession of the real estate.

The first and second paragraphs are undoubtedly good, for they show a wrongful entry upon the plaintiff's land. Such an entry is a trespass, and every trespass is actionable. If a complaint shows a cause of action, it will repel a demurrer, although it may not entitle the plaintiff to all the relief prayed.

We think the third paragraph is sufficient, but if we were wrong in this, we could not reverse the judgment: 1st. Because the agreement in the record shows that the single question the court was required to pass upon was the sufficiency of the answer. 2d. Because the record affirmatively shows that the judgment rests on the first and second paragraphs of the complaint.

Where parties, by an agreement entered of record, definitely submit a single question to the trial court, they can not, on appeal, present any other. So, too, where the record affirmatively shows that the judgment rests on two paragraphs of the complaint, it is not important whether the third was or was not sufficient.

The answers allege that the entry on the plaintiff's land was made by a receiver appointed to take charge of the affairs of the appellant as an insolvent corporation.

The appellant's counsel ingeniously argue that the case is within the rule that a corporation is not liable for the acts of an independent contractor, and that the receiver is to be regarded as such a contractor. In support of this position we are referred to the cases of *Ryan v. Curran*, 64 Ind. 345 (31 Am. R. 123); *Sessengut v. Posey*, 67 Ind. 408 (33 Am. R. 98). We can not adopt the views of counsel, for, in our opinion, the rule referred to has no application whatever to such a case as the present. There is here no question of

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principal and agent, but the question is, had the appellant a right to enter on the land of the appellee, or to retain possession of it? If the appellee owned the land, then the appellant was guilty of an actionable wrong in interfering with his possession, unless its entry was under some person having a right to take possession. If the receiver had no such right, he could not transfer any right of possession, so that even if we were to regard the appellant as a grantee of its receiver, it could have no right to appellee's land unless the receiver had such a right as he could transfer. We do not, however, think that a receiver can be regarded as the grantor of the corporation, for he is merely an officer of the court placed in charge of the corporate affairs until its debts are paid. He is not the owner of the land in his own right, for he can only be the possessor of such rights in another's land as the corporation itself had.

Where the land of a citizen is wrongfully appropriated to the use of a railroad corporation, he does not lose his rights by a failure to make a claim to the receiver for compensation. If the property of the citizen is wrongfully seized and used, he may recover for the injuries sustained, in a case like this, where the receiver has been discharged and the corporate affairs turned back into the hands of the corporation. The right of the land-owner to recover possession of his land is not a claim or debt, but it is a right of action to recover land wrongfully taken from him. Such a right can not be barred by the notice of a receiver, requiring creditors to present their claims against an insolvent corporation.

It is undoubtedly true, as a general rule, that the receiver holds possession as an officer of the court, but this rule does not prohibit an owner of real estate from suing a receiver who enters upon his property without any claim of right. *Ohio, etc., R. W. Co. v. Nickless*, 71 Ind. 271; *Fort Wayne, etc., R. R. Co. v. Mellett*, 92 Ind. 535. Here, however, the action is not against the receiver, but against the corporation which persists in retaining possession of the appellee's land

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without right. The claim is not that the appellee is violating the rights of a court having custody of the corporate property, but that the corporation, having been taken from the hands of the receiver, wrongfully encroaches upon the rights of the appellee by keeping him out of the free use and uninterrupted possession of his land.

The corporation was not dissolved by the appointment of a receiver. It still remained in existence, and when the receiver was discharged it became the wrong-doer in retaining possession of the appellee's land. As it wrongfully deprived the appellee of his property, it must account to him for the loss it has occasioned him. *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487.

Judgment affirmed.

Filed Sept. 22, 1886.

No. 13,086.

TAYLOR v. THE STATE.

CRIMINAL LAW.—*Permitting Minors to Play Pool.*—Where, in a prosecution for allowing minors to play pool in violation of law, the State makes a *prima facie* case, the defendant, to authorize an acquittal, must show that he acted in good faith, and under an honest and reasonable belief that the minors were of full age.

From the Wells Circuit Court.

C. M. France and *M. W. Lee*, for appellant.

F. T. Hord, Attorney General, and *E. C. Vaughn*, Prosecuting Attorney, for the State.

MITCHELL, J.—Section 2087, R. S. 1881, prescribes a penalty of not more than fifty, and not less than five dollars against any one who, while owning or having the care, management, or control of a pool table, allows, suffers, or permits any minor to play pool upon such table.

Taylor v. The State.

The appellant was found guilty upon an indictment charging him with having allowed Joseph D. Gregg and Charles Fritz, both of whom it is charged were minors, to play a game of pool upon a table of which he was the owner.

The only ground upon which a reversal of the judgment is asked is, that the evidence does not sustain the finding of the jury.

The evidence, which is in the record, shows without any conflict, that Gregg and Fritz, with the appellant's permission, played a game of pool on his table, the first named being about twenty, and the other eighteen years old.

It is said, however, that the appellant and James Boden, his clerk or bartender, both testified that each of the minors said, in response to an inquiry from the appellant at the time, that he was over twenty-one, and that the appellant testified further, that he permitted them to play after such inquiry and answer, in the belief that they were over twenty-one years old, and without any knowledge to the contrary.

The argument is, that this testimony was sufficient to have raised a reasonable doubt as to the appellant's guilt, and that being sufficient for that purpose, we must reverse the judgment for want of evidence in support of the finding of the jury. The argument omits two important factors which must be considered: 1. Both Gregg and Fritz testified unequivocally that no inquiry whatever was made of them, and no representation by them concerning their age. The jury may have believed Gregg and Fritz, instead of the appellant and Boden. In that event, since it appears that the appellant predicated his belief, that the boys were of age, solely upon the inquiries and answers, the making of which were affirmed on one side and denied on the other, there would have remained nothing to raise any doubt whatever as to the appellant's guilt. 2. Besides, even if the inquiries and answers were made and given in the manner claimed in appellant's behalf, it would not necessarily follow that the jury must have acquitted. A *prima facie* case having been made by

 Bedelsheimer v. Miller *et al.*

the State, the necessity was upon the appellant to make it appear that, acting in good faith, he believed, and had good reason to believe, that the minors whom he permitted to play pool, in violation of the policy of the statute, were of full age. Notwithstanding the inquiries and answers, there may have been other facts and circumstances in the evidence which left no reasonable doubt in the minds of the jury that the appellant did not act in good faith, and under an honest and reasonable belief, that the minors were of age. *Swigart v. State*, 99 Ind. 111.

The judgment is affirmed, with costs.

Filed Sept. 25, 1886.

 No. 12,674.

REDELSHEIMER v. MILLER ET AL.

PLEADING.—*Practice.*—*Complaint.*—*Demurrer.*—A demurrer which is addressed to a complaint consisting of more than one paragraph, as an entirety, will be overruled if one paragraph be good.

SAME.—*Misjoinder of Parties Not Cause for Demurrer.*—Misjoinder of parties is not a cause for demurrer.

SPECIAL FINDING.—*When will Control General Verdict.*—It is only where the special findings of facts, when construed together, are irreconcilably inconsistent with the general verdict, that the former will control.

SAME.—*Presumptions.*—All reasonable presumptions will be indulged in favor of the general verdict, but nothing will be presumed in aid of the special findings.

EVIDENCE.—*Record of Justice of Peace.*—The record of a justice of the peace is competent evidence of the proceedings had in a suit before him.

CONTRACT.—*Assumption of Debts of Another.*—*Action by Creditor.*—A creditor may maintain an action against one who has agreed, for a consideration, to assume and pay the debts of the debtor.

From the Allen Superior Court.

R. S. Robertson, for appellant.

A. H. Bittinger and *I. Stratton*, for appellees.

107	485
124	504
126	81
126	594
127	59
107	485
122	226
133	491
107	485
124	411
136	72
136	500
107	485
137	480
107	485
140	577
143	435
107	485
153	665
107	485
160	215

Redelsheimer v. Miller *et al.*

Howk, C. J.—In this case the appellee Miller sued appellant Redelsheimer, and one Jacob Oppenheimer, who is named as an appellee in this court, in a complaint of five paragraphs.

In each of such paragraphs appellee Miller sued to recover a balance due him, as alleged, from appellant on an open account for goods sold and delivered to Oppenheimer by such appellee, the payment of which appellant had assumed, for a valuable consideration. The cause was put at issue by appellant's answer in general denial, with an agreement that all matters of defence might be given in evidence thereunder. The issues joined were tried by a jury, and a general verdict was returned into court for appellee Miller, assessing his damages in the sum of \$152. With their general verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the appellant under the direction of the court. Over appellant's motions for judgment in his favor on the special findings of the jury, notwithstanding their general verdict, for a *venire de novo* and for a new trial, the court rendered judgment against him, in favor of appellee Miller, for the damages assessed in the general verdict and the costs of suit.

In this court the first errors assigned by appellant are the overruling (1) of his demurrer to appellee's complaint for the "misjoinder of parties," and (2) his demurrer to each paragraph of such complaint.

The appellant's demurrer, which assigns as cause therefor the "misjoinder of parties," is addressed to the complaint as an entirety. It is impliedly conceded by appellant's counsel, that this objection is applicable only to the first paragraph of complaint. For, in his brief of this cause, counsel says: "Surely, it needs no authority to show that, in the first paragraph of complaint, the cause of action is one which Jacob Oppenheimer had nothing to do with; while in all the others he was a necessary party." There was no error, therefore, in overruling this demurrer to the complaint. Besides, there is no such cause of demurrer as the "misjoinder of parties,"

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known to our law. Section 339, R. S. 1881, provides that a defendant may demur to the complaint for certain specified causes, whereof the "misjoinder of parties" is not one, and then enacts that "for no other cause shall a demurrer be sustained."

The demurrer to each paragraph of complaint assigned, as the only cause of demurrer, that it did not state facts sufficient to constitute a cause of action. The error assigned by appellant, upon the overruling of this demurrer, is not even alluded to in the brief of his counsel. This error, therefore, is regarded as waived.

The next error complained of here by appellant is the overruling of his motion for judgment in his favor upon the special findings of the jury, notwithstanding their general verdict. The facts found specially by the jury, in their answers to the interrogatories propounded to them, were in substance as follows:

The defendant, Jacob Oppenheimer, stated to appellant Redelsheimer, on the 1st day of September, 1884, before the transfer of the stock of goods by Oppenheimer to Redelsheimer, that his indebtedness to the plaintiff was only \$40; and Redelsheimer replied, "Well, if that is all you owe him, I will take the stock and pay the debts;" and, on that agreement, Oppenheimer turned the stock over to Redelsheimer. At the time the possession of said stock was delivered, Oppenheimer stated to James T. Pool (Redelsheimer's attorney) that he only owed Miller \$40, and Redelsheimer had agreed to take the stock and pay the debts. The next morning Redelsheimer stated to Miller's attorney, Mr. Bittinger, that he had only agreed to pay Miller \$40. Both Redelsheimer and Oppenheimer informed the plaintiff Miller, on the Monday following the transfer, that Redelsheimer had only agreed to pay Miller \$40, and had not agreed to pay any more. Miller, at that time, had not accepted the terms of the contract. Miller did not say to Redelsheimer, on the Monday following, that he would see him further about it. It is not

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a fact that plaintiff did, before the commencement of this suit, accept the contract made between Redelsheimer and Oppenheimer, and did not so testify. Redelsheimer did, at the time of his proposition in Oppenheimer's room, promise Oppenheimer that he would pay Miller more than \$40. The value of the stock Oppenheimer transferred to Redelsheimer was \$450. Redelsheimer has already paid \$9.15 costs in the attachment suit, to C. Bremen \$2.33, to J. W. Smith \$3 or over, Oppenheimer's board bill \$6, attorney's fee in attachment suit \$5, to Rothschild Bros. \$137.10, to Redelsheimer & Brooks \$40.87, and his undivided [individual?] claim was \$110.59, and all these debts and claims were paid on account of his agreement made with Oppenheimer.

It is earnestly insisted, on behalf of the appellant, that the trial court clearly erred in overruling his motion for a judgment in his favor upon the facts found specially by the jury, notwithstanding their general verdict. The code provides: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Section 547, R. S. 1881. This section is almost a literal re-enactment of section 337 of the civil code of 1852, and its provisions have been continuously in force, therefore, as a part of the law of this State, for more than one-third of a century. Of course, the provisions of the section quoted have often been the subject of judicial comment and construction, in the reported decisions of this court. It was early held, and the holding has been uniformly adhered to, that if the special findings can, upon any hypothesis, be reconciled with the general verdict, the former will not control the latter, and the court must give judgment on the general verdict. *Amidon v. Gaff*, 24 Ind. 128; *Woollen v. Wishmier*, 70 Ind. 108; *Carver v. Leedy*, 80 Ind. 335; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88. In the case last cited, it was held also, that in determining such a question as the one now under consideration, all reasonable presumptions will be indulged by this court in

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favor of the general verdict, while nothing will be presumed in aid of the special findings of facts. *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442; *Lassiter v. Jackman*, 88 Ind. 118.

We have also held that, in passing upon the question we are now considering, all the facts found specially by the jury must be construed together, for the purpose of ascertaining their true legal effect, and that if, when thus considered, they are inconsistent and can not be reconciled with the general verdict, they will control it, and the court must give judgment accordingly. Where, however, the facts specially found, when construed together, are manifestly inconsistent with each other, contradictory and uncertain in their meaning, as in the case under consideration, it is well settled by our decisions, that such special findings of facts will not control the general verdict, but the latter must stand, and judgment must be rendered thereon without regard to the special findings of the jury. *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412; *Hereth v. Hereth*, 100 Ind. 35; *Indiana Car Co. v. Parker*, 100 Ind. 181.

In the case in hand, we are of opinion that the court committed no error in overruling appellant's motion for a judgment in his favor on the special findings of the jury, notwithstanding their general verdict.

Under the alleged error of the court, in overruling appellant's motion for a new trial, it is claimed by his counsel in argument, that the court erred in admitting in evidence a justice's record of two suits, "without any accompanying papers." The justice's record was competent evidence of the proceedings had in the two suits. *Miller v. State, ex rel.*, 61 Ind. 503. The justice testified, and he is not contradicted, "that all the papers in the case are set out in full on my docket," and his docket or record was produced in evidence. There was no error in the admission of such record in evidence, without the accompanying papers.

Appellant's counsel also insists "that all the evidence,

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which the court admitted, relative to the attachment proceedings, including the record introduced, was not only irrelevant but prejudicial to the appellant." Appellee's cause of action against Redelsheimer had its origin in the attachment proceedings, which the latter had instituted against Oppenheimer, and these proceedings are set out very fully in several paragraphs of the complaint in this suit. These proceedings thus became a part of appellee's case, and were admissible in evidence for the purpose, if for no other, of showing the circumstances under which appellant agreed with Oppenheimer to assume and pay the latter's debts. We have examined the court's instructions to the jury, and think they fairly stated the law applicable to the case made by the pleadings and evidence. The agreement between appellant and Oppenheimer, that the former would assume and pay the latter's debts, certainly enured to the benefit of appellee, as one of Oppenheimer's creditors, and authorized him to recover of appellant his account or claim against Oppenheimer in this suit. This is substantially what the court told the jury in its instructions, and they were not erroneous. This has been the law of this State since the decision in *Bird v. Lanius*, 7 Ind. 615.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 24, 1886.

 No. 13,373.

WILSON v. JOSEPH.

INJUNCTION.—*Attachment in Another State.—Evasion of Exemption Laws.*—
Injunction will lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident, in the courts of

107	490
142	157
107	490
146	691

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another State, in violation of section 2162, R. S. 1881, which makes it an offence to send a claim against a debtor out of the State for collection, in order to evade the exemption laws.

From the Floyd Circuit Court.

B. F. Davis, for appellant.

J. K. Marsh, for appellee.

ELLIOTT, J.—It is alleged in the complaint that the appellant is a resident householder of this State, and an employee of a railroad company incorporated under the laws of the State; that the appellee is also a resident of Indiana; that the latter is about to institute proceedings in attachment in the State of Illinois, and will, unless restrained, garnish the wages due the former from his employer, and that the purpose of the appellee is to prevent the appellant from availing himself of the exemption laws of Indiana. Prayer for an injunction restraining the appellee from prosecuting his proceedings in attachment in the courts of Illinois.

It is a familiar principle of equity jurisprudence, that decrees in equity operate only on the person, and that suits will be entertained although the subject of the suit is situated in another State. Mr. Pomeroy thus states the general principle: "Where the subject-matter is situated within another State or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any State where jurisdiction of defendant's person is obtained, although the land or other sub-

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ject-matter is situated in another State or even in a foreign country." 3 Pomeroy Eq. Juris., section 1318. Judge Story lays down a like doctrine. Story Eq. Juris., section 899.

Our own court has recognized and enforced this equitable principle, as, indeed, all the courts have done, without any material diversity of opinion. *Bethell v. Bethell*, 92 Ind. 318. The principle asserted by these authorities supplies the initial proposition for our decision, and the only possible doubt that can arise is whether it applies to such a case as the present. The authorities do apply it to such cases, and in our judgment they proceed on sound and satisfactory reasoning. In *Snook v. Snetzer*, 25 Ohio St. 516, the question was presented, as it is here, and it was held that an injunction would lie. The same view of the law was asserted in *Dehon v. Foster*, 4 Allen, 545, where it was said: "An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our laws, because it is effected through the instrumentality of a process which is lawful in a foreign tribunal. By interposing to prevent it, we do not interfere with the jurisdiction of courts in other States, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction, to prevent them from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights and to the wrong and injury of our own citizens." In the recent case of *Cunningham v. Butler*, 5 E. R. 725, the general principle which rules here is strongly asserted and rigidly enforced. The question came before the court in *Engel v. Schuerman*, 40 Ga. 206 (2 Am. R. 573), in the same form as it comes before us, and it was held that an injunction would lie. What we have said of the case just mentioned applies to *Keyser v. Rice*, 47 Md. 203 (28 Am. R. 448), where the precise question was adjudicated. The Supreme Court of Kansas, in two recent cases, adopts substantially the same views as those asserted in the cases to which

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we have referred. *Zimmerman v. Franke*, 34 Kan. 650; *Missouri Pacific R. W. Co. v. Maltby*, 34 Kan. 125.

The authorities upon the general question are collected in a late number of the Central Law Journal, and an examination of the cases there collected will prove that an injunction is the appropriate remedy in such a case as the one in judgment. 23 Cent. L. J. 268.

The object of our exemption laws, as this court has many times declared, is to secure to a resident householder the reasonable comforts of life for himself and his family. This is a doctrine asserted by our organic law and by our statutes. It was to give full and just effect to this humane and benign principle of our law, that the Legislature enacted a statute making it an offence for any person to send a claim against a debtor out of the State for collection, in order to evade our exemption laws. R. S. 1881, section 2162. The enactment of which we are speaking is prohibitory in its character, for it is one of the rudimentary principles of the law that a statute making an act a criminal offence prohibits its performance as effectually as if the prohibition were expressed in direct terms. There can, therefore, be no doubt that our statutory law prohibits a creditor from evading our exemption laws by sending his claim to a foreign jurisdiction for collection.

The attempt to take from a workman the wages earned by him, by sending the claim to a jurisdiction where our exemption laws will not avail him, is one that the courts will not tolerate. They will, on the other hand, lay "the strong arm of chancery" upon persons within their jurisdiction, and prevent them from taking away the wages which our Constitution and our statute wisely secure to him for the support of his family.

The case of *Uppinghouse v. Mundel*, 103 Ind. 238, is addressed to questions essentially different from those presented by this record, and it is, therefore, not at all in point.

Judgment reversed.

Filed Sept. 25, 1886.

Hilgenberg v. The Board of Commissioners of Marion County.

No. 12,019.

HILGENBERG v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

TAXES.—*Refunding by County.*—*Purchaser at Sale.*—*Reduction of Lien at Suit of Owner.*—Sections 5813 and 5814, R. S. 1881, which provide for the refunding of taxes by the county to the owner of land, where the same have been paid in pursuance of a wrongful assessment, furnish no remedy to a purchaser at a tax sale whose lien is reduced at the suit of the land-owner.

SAME.—*Remedy of Purchaser.*—The purchaser at a tax sale, to make a case under section 6487, R. S. 1881, for the refunding of taxes paid by him, must show either that the land was not subject to taxation, or that the taxes had been paid before the sale.

SAME.—*Complaint.*—The remedy of the purchaser at a tax sale is wholly statutory, and unless he can bring his complaint within some provision of the statute it will be bad.

From the Marion Superior Court.

I. Klingensmith and W. P. Adkinson, for appellant.

S. Claypool and W. A. Ketcham, for appellee.

MITCHELL, J.—The appellant, Hilgenberg, petitioned the board of commissioners of Marion county, praying that certain taxes should be refunded him.

The facts upon which he predicated his claim were set forth at large, and were, in substance, as follows: In June, 1880, Arthur G. Fosdyke, purchased at a private tax sale, made by the county auditor, certain real estate which is described. He paid therefor \$497.05, which was the amount claimed for delinquent taxes, penalties, etc. A certificate of purchase in due form was issued to the purchaser. This was afterwards assigned to Hilgenberg who had the assignment duly recorded. Subsequently the owner of the land commenced a suit in the superior court of Marion county, to set the sale aside, and to enjoin the auditor from issuing a deed on the certificate. Such proceedings were had in that case, as that the superior court adjudged that the amount due as taxes, interest, etc., at the time of the sale, was \$415.35 in-

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stead of \$497.05, and that Hilgenberg's lien on the land should be confined to the sum of \$415.35, with interest. His lien was enforced against the land for this latter sum. The appellant claimed that, because the taxes, penalties, costs, etc., actually due at the time of the sale, were \$81.70 less than the amount called for by the certificate of sale, the board should refund him that amount, together with \$37 costs, which he was obliged to pay in the suit above mentioned. The board rejected the claim, and the matter came by appeal to the superior court.

In that court a demurrer was sustained to the petition, and the sole question here is, whether upon the facts stated the appellant is entitled to any relief as against the county.

The claim is based on sections 5813 and 5814, R. S. 1881. These sections provide, in substance, that when any person shall appear before the board of commissioners of any county, and establish by proper proof that he has paid any amount of taxes which were wrongfully assessed against him, it shall be the duty of the board to refund to such person from the county treasury the amount proved to have been paid for county taxes. Where any part of the amount so assessed has been paid into the State treasury, it becomes the duty of the board to certify the amount so proven to the auditor of State, whose duty it is to audit and repay the amount out of the State treasury.

The foregoing provisions have obviously no application to the case of a purchaser at a tax sale. They were designed, as is apparent from the terms employed, to supply a statutory remedy, so as to enable a property-owner whose property has been wrongfully assessed to obtain repayment of taxes which have been paid in pursuance of such wrongful assessment. The remedy being statutory, it can only be resorted to by persons who, within the terms of the statute, are entitled to its benefits.

Even if the appellant had been the owner of the property, and the person who paid the taxes in the first instance, the

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averments in the petition come far short of showing that any portion of the taxes for which the property was sold were wrongfully assessed. All that is averred in that regard is, that in a certain suit brought by the owner of the land against the appellant and the county auditor, it was adjudged that the taxes, interest, penalties, etc., were \$415.35 instead of \$497.05. There are no facts averred which show that the assessment or any part of it was wrongful.

The county was not a party to that suit, and is, therefore, not concluded by a judgment rendered in an action to which it was not a party, and of which it had no notice. *McWhinney v. City of Indianapolis*, 98 Ind. 182.

To have entitled the person who paid the taxes to the remedy provided, it must have appeared in the petition that the taxes, which he claimed should be refunded, were wrongfully assessed. *Board, etc., v. Murphy*, 100 Ind. 570; *Board, etc., v. Armstrong*, 91 Ind. 528.

As before observed, the statute relied on has no application to the case of a purchaser at a tax sale.

Section 228, 1 R. S. 1876, p. 124, which was in force at the time the sale was made, and which was substantially the same as section 6487, R. S. 1881, provided that where land had been sold for taxes, which was not liable to taxation, or when the taxes had been paid before sale, the purchaser might have the purchase-money refunded out of the county treasury. There are no averments in the petition showing that the land was not subject to taxation, or that any part of the taxes had been paid. The petition wholly fails to make a case within any of the statutory provisions which authorize the money paid at a tax sale to be refunded. There is no common law liability of the county.

In respect to the legality of the proceedings on which a tax sale is based, as well as to the validity of the title of land sold, a purchaser at such sale assumes all risk, except such only as the statute makes provision for. If he fails to acquire title, or if his lien is less extensive than he anticipated,

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he may have such recourse, and such only as the statute provides. *City of Logansport v. Humphrey*, 84 Ind. 467.

The remedy of a purchaser at a tax sale being wholly statutory, since the facts put forward by the appellant do not bring his case within any statute which provides a remedy, the ruling of the court in sustaining the demurrer to his petition was correct.

Judgment affirmed, with costs.

Filed Sept. 24, 1886.

No. 12,407.

PATTERSON, ADMINISTRATRIX, v. THE SCOTTISH AMERICAN
MORTGAGE COMPANY.

107 497
161 75

SUPREME COURT.—*Questions of Jurisdiction Over Subject-Matter.—When May be Raised.*—The rule that the question of jurisdiction over the subject-matter of the action can be raised at any time, does not apply to a case in which the record is fully made up for a final adjudication, upon other questions, in an appellate court.

SAME.—*Appeal from Marion Superior Court.—Assignment of Error.*—Upon an appeal to the Supreme Court from the superior court of Marion county, the only error which can be assigned is, that the superior court at general term erred in affirming or reversing the judgment rendered at special term.

SAME.—*Pleading.—Judgment.—New Trial.*—Errors in rulings upon the pleadings and upon the judgment are not causes for a new trial, but, to be available on appeal, must be separately assigned.

From the Marion Superior Court.

E. A. Parker, for appellant.

J. M. Judah and O. B. Jameson, for appellee.

NIBLACK, J.—This was a suit by the Scottish American Mortgage Company, Limited, to foreclose a mortgage on real estate in Marion county, executed by Samuel J. Patterson,

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since deceased, and his wife, Patsey Patterson, to secure the payment of certain promissory notes therein described, copies of all which were filed with the complaint. Patsey Patterson, as administratrix, as well as the widow, in conjunction with the heirs at law of the said Samuel J. Patterson, and nearly, if not quite, forty other persons supposed to have some interest in the matters in controversy, were made defendants. The suit was commenced on the 18th day of June, 1884, and on the 3d day of September, 1884, Mrs. Patterson, as administratrix of the estate of Samuel J. Patterson, the decedent, answered in two paragraphs:

First. In general denial.

Secondly. Admitting that the said Samuel J. Patterson had died on the 25th day of May, 1883, and that letters of administration had been granted to her on the 13th day of June, 1883, as alleged in the complaint; also, admitting that the said Samuel J. Patterson died seized of the real estate described in the complaint, as well as the execution of the notes and mortgage in suit and the liability of the estate to pay the amount due upon said notes, but averring that from said 13th day of June, 1883, to the time of filing the complaint herein, as well as until the time of filing this answer, she had been endeavoring to sell the real estate of the decedent to pay the debts due from his estate, and had been diligently engaged in settling up the affairs of said estate, as well as in paying, in their proper order, the debts against the same; also, averring that the plaintiff had failed to file the notes and mortgage sued on, or any statement thereof, in the office of the clerk of the Marion Circuit Court, which had jurisdiction of the decedent's estate, within one year from the date of notice of the issuance of letters of administration, or at any time before the commencement of this suit. Wherefore she demanded that neither attorney's fees nor costs should be allowed or taxed against the decedent's estate.

A demurrer was sustained by the court below, at special term, to the second paragraph of Mrs. Patterson's answer,

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and after hearing the evidence the court made a finding of the amount due upon the notes, and, disregarding a motion for a new trial, entered by Mrs. Patterson only in her capacity as administratrix, decreed a foreclosure of the mortgage and a sale of the mortgaged lands for the payment of the amount so found to be due, which included attorney's fees and costs of suit, to all of which exceptions were reserved.

The causes assigned for a new trial were: *First*. That the damages assessed were excessive. *Second*. That there was error in the assessment of the damages, the amount assessed being too large. *Third*. That the finding was not sustained by sufficient evidence. *Fourth*. That the finding and judgment were both contrary to law. *Fifth*. That the court erred in sustaining a demurrer to the second paragraph of Mrs. Patterson's answer. *Sixth*. That the court erred in overruling Mrs. Patterson's motion to modify the decree and her exceptions to the entry of the same.

Mrs. Patterson alone, and only as the administratrix of the estate of the decedent, Samuel J. Patterson, appealed to the general term, assigning error only upon the overruling of her motion for a new trial, where the judgment at special term was affirmed.

Mrs. Patterson, still further appealing to this court, has assigned as error: *First*. That the court below had no jurisdiction of the subject-matter of this suit. *Second*. That the court below, at general term, erred in affirming the judgment at special term.

While the general rule that the question of jurisdiction over the subject-matter of the action can be raised at any time, is well recognized, the rule is nevertheless one which has a practical application to cases only so long as they remain open for a question of some kind, and hence does not apply to a case in which the record is fully made up for an ultimate and final adjudication, upon other questions, in an appellate court. In this case, the record was fully made up in that respect when the appeal was submitted to the court below at

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general term upon error assigned upon the proceedings at special term.

It has become an established rule of decision in this court, that upon an appeal from the superior court of Marion county, the only error which can be assigned upon the proceedings appealed from is, that the court at general term erred either in affirming or reversing the judgment rendered at special term. *Buskirk* Pr. 130; *Cline v. Love*, 47 Ind. 258; *Munson v. Lock*, 48 Ind. 116; *Hadley v. Milligan*, 100 Ind. 49; *McNeely v. Holliday*, 105 Ind. 324.

Hence, upon such an appeal, no question can be properly considered by this court, which was not, by an appropriate assignment of error, presented to the general term below.

As has been already seen, the only error assigned in this case at general term was upon the overruling of Mrs. Patterson's motion for a new trial. That assignment of error only authorized the general term to inquire whether a new trial, as prayed for by Mrs. Patterson, had been correctly refused, and, in that connection, only to consider such matters as had been lawfully assigned as causes for a new trial. The motion for a new trial having raised no question of jurisdiction over the subject-matter of the suit, no such question was involved at the hearing at general term. It follows that this appeal brings before us no question of jurisdiction, and can not now be made to bring any such question by a new assignment of error in this court.

As at present advised, we would not feel justified in holding that there was error in sustaining a demurrer to the second paragraph of Mrs. Patterson's answer. But, conceding the action of the court in that respect to have been erroneous, the error was one which could not be made available as a cause for a new trial. It preceded and was disconnected with the trial. Error must be separately assigned upon questions reserved on the pleadings, to make such questions available upon review in an appellate court.

So, if a judgment be rendered contrary to law, or if the

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court improperly refuses to modify an erroneous judgment, no cause is thereby afforded for a new trial. In either case the error occurs after the trial has been concluded, and has also no connection with the trial. Error must, therefore, be separately assigned upon questions reserved upon the judgment. It further follows that none of the questions most elaborately discussed in argument upon this appeal are presented by the record as it comes to us from the general term below.

In support of the allegation that the finding of the court at special term was not sustained by sufficient evidence, it is urged that there was no proof of the execution of either the notes or mortgage as required by the statute in proceedings against the estates of deceased persons. R. S. 1881, section 364.

The bill of exceptions, purporting to embrace the evidence given at the hearing at special term, contains the following statement as supplying a part of the evidence upon which the finding was based: "It was admitted on the trial by the defendant, Patsey Patterson, administratrix of the estate of Samuel J. Patterson, deceased, and all the other defendants appearing, that all the allegations of the plaintiff's complaint were true, excepting as to plaintiff's right to recover costs and attorney's fees in this action, and that the signature of Samuel J. Patterson upon each of said notes and the mortgage herein is the genuine signature of said Samuel J. Patterson, deceased." This clearly supplied all the proof of the execution of the notes and mortgage which was requisite at the trial, and hence dispensed with the necessity of any more formal proof on that subject.

No sufficient cause has been shown for a reversal of the judgment below at general term.

That judgment is therefore affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this cause.

Filed Oct. 5, 1886.

Graffy v. The City of Rushville.

No. 12,741.

GRAFFTY v. THE CITY OF RUSHVILLE.

CITY.—*Hawkers and Peddlers.—Power to Restrain.*—Under subdivision 23 of section 3106, R. S. 1881, which empowers cities incorporated under the general law “to restrain hawking and peddling,” any mode of selling goods which does not fall within these terms can not be made unlawful by ordinance.

SAME.—*Definition of Hawking and Peddling.*—Any method of selling goods by outcry on the streets or public places in a city, or by attracting persons to purchase goods exposed for sale at such places by placards or signals, or by going from house to house selling or offering goods for sale at retail to individuals not dealers in such commodities, whether they be carried along for present delivery, or the sales be made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute.

SAME.—*Constitutional Law.—Ordinance.—Discrimination Against Citizens and Products of Other Communities.*—A city ordinance, requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which such city is situated, to procure a license and pay a fee therefor before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities, and is unconstitutional and void.

From the Rush Circuit Court.

J. Q. Thomas, J. J. Spann and C. A. Dryer, for appellant.
G. H. Punttenney and A. B. Irvin, for appellee.

MITCHELL, J.—Subdivision 23 of section 3106, R. S. 1881, empowers cities incorporated under the general law of the State of Indiana, “To regulate the ringing of bells and crying of goods, and to restrain hawking and peddling.” Assuming to act under the authority thus conferred, the common council of the city of Rushville, on the 10th day of September, 1883, passed an ordinance of the tenor following: “That every person who peddles, hawks, sells, or exhibits for sale, any goods, wares or merchandise, not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares or merchandise, for immediate or future delivery, about the streets, alleys, hotels, business

107	509
136	472
107	509
130	111
107	502
138	37
107	502
142	36
107	502
161	259
107	502
169	510
169	511

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houses, private dwellings, or at any public or private place in said city, without having paid the marshal from two to six dollars for each day, six to ten dollars for each week, and ten to twenty dollars for each month, at the discretion of the marshal, such person may desire to follow such business within said city, and receiving a permit therefor from the mayor of said city, shall, upon conviction thereof, be fined, forfeit and pay to said city a sum not exceeding ten dollars for each day such person shall continue such business without receiving a permit as in this section set forth: *Provided*, That nothing in this section shall be construed to apply to any citizen of said city, or any commercial travellers, known as drummers, runners or agents, travelling for any wholesale house selling to dealers."

James F. Grafty was found guilty of a violation of the foregoing ordinance, upon the complaint of the city of Rushville, which charged him with having, on the 4th day of September, 1885, unlawfully "taken orders from a citizen of said city, whose name is unknown, for shirts, socks and men's furnishing goods, for future delivery, about the streets, alleys and business houses within said city, the said shirts, socks and men's furnishing goods, not being the manufacture of Rush county, Indiana, * * * and the said James F. Grafty not being then and there a resident of said city."

The evidence fairly tends to show that Grafty resided in Indianapolis, and was in the employ of Paul H. Krauss, a manufacturer of and dealer in shirts, underwear, and gentlemen's furnishing goods, residing and having his business house in the city of Indianapolis.

The evidence reasonably tends to show that Grafty's manner of business was to carry samples of the different articles manufactured or sold by his employer, and exhibit them from house to house, or from one business place to the other, to individuals not dealers, soliciting orders from each individual for such articles and in such quantities as the individual might require or purchase. The goods thus ordered were to be de-

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livered at a future day by express or otherwise. Graffty delivered no goods, nor did he carry with him any goods except the samples.

The consideration of two questions is involved in the discussion upon the errors assigned:

1. Was the business of the appellant, conducted in the manner described, within the prohibition of an ordinance, such as might lawfully have been enacted, under the statute giving cities the power to restrain hawking and peddling?

2. Was the ordinance in question, which required license only in case the goods, wares and merchandise, hawked or peddled, were not the growth or manufacture of Rush county, and only in case the hawker or peddler was not a resident of the city of Rushville, a valid exercise of power?

Pertinent to the first proposition, it may be said, the effect of the ordinance under consideration can not be enlarged, nor its operation rendered more comprehensive, by the attempt to bring within its terms persons who sell, or exhibit for sale, or those who take orders for, goods, wares and merchandise for future delivery, unless such sales or exhibitions are made in such manner as to constitute the persons who make them hawkers or peddlers. The extent of the power conferred upon cities by the statute, in this connection, is to restrain hawking and peddling, and any mode of selling goods, which does not legitimately fall within these terms, can not be made unlawful by being specifically described and restrained in the ordinance. Such sales and exhibitions of wares, and such orders for the future delivery of goods, and such only as are embraced by the terms "hawking and peddling," may be restrained by ordinances duly passed, under the power conferred by the statute above set out.

It becomes important, therefore, to inquire what constitutes a hawker or peddler.

In the case of *Commonwealth v. Ober*, 12 Cush. 493, SHAW, C. J., said: "The leading primary idea of a hawker and peddler is, that of an itinerant or travelling trader, who car-

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ries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

The term "hawking" also embraces the business of one who sells, or offers goods for sale, on the streets by outcry, or by attracting the attention of persons by exposing his goods in a public place, or by placards, labels or signals.

Webster defines peddling as travelling about and selling small wares, and hawking as offering for sale in the streets by outcry. Another definition runs thus: "A peddler, petty chapman, or other trading person going from town to town or to other men's houses, and travelling either on foot, or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." Rapalje and Lawrence Law Dict., Tit. "Hawker."

In Jacob's Law Dictionary, a definition, indicative of the disfavor in which the common law held the vocation, is as follows: "*Hawkers*. Those deceitful fellows who went from place to place, buying and selling brass, pewter and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *hawks* seize their game where they can find it. * * Hawkers and peddlers, etc., going from town to town or house to house are now to pay a fine and duty to the King."

The purpose of the statute, in empowering cities to pass ordinances in restraint of hawking and peddling, was doubtless two-fold:

One end to be attained was the protection and encouragement of local traders and merchants, who are largely dependent for their patronage on their reputation for integrity and fair dealing, and their social and moral standing in the community; and who by investing their means in providing fixed places of trade, and paying taxes on their merchandise, help to build up and maintain the city in which they reside, and

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contribute to the support of its schools and other local interests and enterprises.

The other was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders of unknown repute, who are frequently patronized by persons, in order to be rid of their importunities and presence.

If the itinerant trader may avoid an ordinance enacted to subserve the ends which we have supposed, by going from house to house, making sales, merely exhibiting samples of his wares, leaving another to follow to deliver the goods, or making the delivery by any other method, all the evils which were intended to be guarded against remain ; while none of the protection contemplated is afforded.

The thing to be restrained is the putting of goods, the owners of which may or may not have contributed by way of taxation to the benefit of the municipality, in competition with the goods of the local merchant, every dollar's worth of whose stock has been subjected to municipal taxation, and who has contributed to the social, educational, and financial prosperity of the city. The travelling trader, who uses the street or public grounds as his place of business, or who goes unbidden from house to house into private residences to ply his trade, is not a fair competitor for the other who builds or rents a costly and commodious structure wherein to serve his customers.

The police power of the city may, therefore, be properly exerted to restrain all such as by their methods of doing business are liable to invade social order, by seeking purchasers for their wares in the homes of citizens, or in the streets and public places of a city, to the discouragement of the more legitimate methods of others on whom the municipality is dependent for its support.

Any method of selling goods, wares or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such

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places, by placards or signals, or by going from house to house, selling or offering goods for sale at retail, to individuals not dealers in such commodities, whether the goods be carried along for delivery presently, or whether the sales are made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking or peddling, without being duly licensed. *Allen v. Sparkhall*, 1 B. & Ald. 100; *King v. Turner*, 4 B. & Ald. 510; *Gregg v. Smith*, L. R. 8 Q. B. 302; *Howard v. Lupton*, L. R. 10 Q. B. 598; *Morrill v. State*, 38 Wis. 428 (20 Am. R. 12).

The next question might require more consideration but for the decisions, in analogous cases, of the Supreme Court of the United States, whose judgments are of binding authority on us upon all like questions.

As will have been observed, the hawking or peddling of goods by residents of the city of Rushville, or the sale of goods by any one without regard to residence, provided such goods have been manufactured or produced in Rush county, are not subject to the restrictive provisions of the ordinance. It only requires that the ordinance be read, to discover that the purpose of its authors was to secure to the citizens of Rushville special privileges and immunities exempt from cost, which could be enjoyed by non-residents only upon condition that they should submit to burdensome exactions, to be imposed in each case largely at the discretion of the city marshal. So in respect to goods or merchandise manufactured or produced in Rush county. Whoever was so minded might cry these in the street, or hawk them from door to door without restriction; while the venders of the products and manufactures of other counties or States, before selling in like manner, must submit to the requirements of the ordinance, under pain of prescribed penalties, in case of sales without paying the exacted license.

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The design of the ordinance seems to be, not so much to protect and encourage merchants and traders, who serve their customers in fixed places of trade, or to discourage the annoyance, if such it be, of making the public streets and private houses places for the sale of wares, as to exclude all others than residents of the city from exercising the calling of peddlers within the city limits, and to subject all goods and merchandise manufactured outside of Rush county, and sold within the city, to a discriminating burden.

Unless, therefore, it can be maintained that a city may deny to the citizens of other cities and communities privileges and immunities which may be enjoyed by its own, and that it may impose burdens on the goods manufactured outside of a given district, which are not imposed on all goods under like circumstances, the ordinance would seem to be void.

Briefly, as to the validity of this ordinance, within the provisions of our State Constitution, section 23, of article 1, Constitution of Indiana, provides as follows:

“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

That it would have been beyond the power of the General Assembly to have conferred upon the citizens of the city of Rushville the privilege of vending goods in that city, upon terms less onerous, and not equally open to all the citizens of the State, seems too clear for debate. It is equally clear that it could not have imposed upon the products of other counties, sold within the city of Rushville, burdens different from those imposed upon goods manufactured or grown in Rush county. The General Assembly having no such power, it could not, even if it had attempted so to do—which it has not—confer upon the common council the power to do that which the Constitution prohibits it from doing. It results that the common council of the city of Rushville, which can exert in this respect only delegated power, can not be possessed of power to grant privileges to the

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citizens of Rushville, which are not equally and upon the same terms open to all citizens.

The General Assembly, as also common councils of cities, may without doubt prescribe the qualifications in respect to residence, age, moral character, etc., of those who may exercise vocations which are proper subjects of police regulations, but it can not grant privileges and immunities to one citizen, or class of citizens, which are not obtainable upon the same terms by all others.

Independently of the considerations mentioned, the ordinance in question is incapable of being enforced by reason of its plain repugnance to those provisions of the National Constitution, which commit to Congress the exclusive power to regulate commerce among the several States, and provide that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. Upon these subjects the decisions of the Supreme Court are uniform and authoritative.

Whatever the extent to which States or municipalities may go in the exercise of police regulations, or in the imposition of occupation taxes, they can not, in respect to either subject, legislate in such manner as to control the inhibitions of the Federal Constitution. *Walling v. Michigan*, 116 U. S. 446.

The State of Missouri prescribed by statute that the sale of goods, wares and merchandise, not the produce or manufacture of that State, by any person going from place to place, should constitute the person so selling a peddler, and required of such persons a license; while to sell in like manner such goods as were grown or manufactured in the State, no license was required. The validity of this enactment having come before the Supreme Court of the United States, it was held in *Welton v. Missouri*, 91 U. S. 275, to be discriminating legislation of such a character as to be within the constitutional inhibition.

A like ruling was made upon a similar statute, passed by

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the State of Maryland, in the case of *Ward v. Maryland*, 12 Wall. 418.

The same question was elaborately considered by Mr. Justice HARLAN, in *Guy v. Baltimore*, 100 U. S. 434. In the case last cited an ordinance, adopted by the mayor and common council of the city of Baltimore, imposed certain wharfage burdens upon goods, wares and merchandise other than the products of the State of Maryland. While holding that the city had the power to exact reasonable wharfage fees, equally from all who used its wharves, the power to build up its domestic commerce by means of unequal burdens upon the business and industry of other States was denied.

Construing a statute of similar import, the Supreme Court of Maine said: "It allows goods manufactured in this State to be peddled free, and exacts a license fee from those who peddle similar goods which are manufactured out of the State. Such a discrimination in favor of goods manufactured in this State, and against goods manufactured in other States, violates the Federal Constitution." *State v. Furbush*, 72 Maine, 493. See, also, the following authorities which are to the like effect: *Webber v. Virginia*, 103 U. S. 344; *Brown v. Houston*, 114 U. S. 622, 631, and cases cited; *City of Marshalltown v. Blum*, 58 Iowa, 184 (43 Am. R. 116); *Ex Parte Frank*, 52 Cal. 606 (28 Am. R. 642); 2 Dillon Munic. Corp., sections 743, 744, and notes.

In support of the validity of the ordinance, and to sustain the ruling of the court below, counsel for the city rely upon *Sears v. Board, etc.*, 36 Ind. 267, and *City of Huntington v. Cheesbro*, 57 Ind. 74. The case last cited decides nothing more than that cities have the power to pass ordinances in restraint of hawking and peddling. The ordinance there under consideration involved no question of discrimination against persons or property. No doubt can be entertained but that such ordinances are valid. The other case relied upon arose out of a consideration of so much of section 5269, R. S. 1881, as requires travelling merchants and peddlers who

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are not residents of this State, and who vend foreign merchandise, to obtain license as therein prescribed. The opinion in that case seems to depend largely for support upon *Woodruff v. Parham*, 8 Wall. 123, and the decisions of the Supreme Court of the State of Maryland, in *Ward v. Maryland*, 9 Am. Law Reg. (N. S.) 424.

Concerning the last mentioned case, in which the Supreme Court of the State of Maryland sustained the validity of a statute similar to that involved in *Sears v. Board, etc., supra*, it is sufficient to say, the judgment of the State court was reversed on appeal by the Supreme Court of the United States in *Ward v. Maryland, supra*.

To indicate the extent to which the case of *Woodruff v. Parham, supra*, is applicable to the question under consideration here, it is only necessary to quote from the opinion of Mr. Justice MILLER the following paragraph: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void."

Whatever incidental application the case of *Sears v. Board, etc., supra*, may have to the question before us—and we concede that it has some—and without further remark as to the propriety of the conclusion there reached, we can not, with the later authoritative judgments of the highest judicial tribunal of the land before us, allow it to control our judgment in this case.

The conclusion plainly deducible from the decisions is, that

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neither States nor municipalities can enforce any law or ordinance, the effect of which is to embarrass commercial communication between the different States, or to discriminate against the products of one State, or exact licenses from persons residing in foreign States which are not required of its own citizens under like circumstances. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692), and cases cited; *Higgins v. Three Hundred Casks of Lime*, 130 Mass. 1.

On the other hand, where by the terms of a law or ordinance regulating the sale of goods by hawkers or peddlers, the privilege is equally open to all upon the same terms, and the license fees imposed for the privilege are the same regardless of the State or district wherein the goods are manufactured or produced, such law or ordinance is a legitimate exercise of power, and will be upheld.

Because the ordinance in question is an infringement of these privileges, it is repugnant to the constitutional provisions above referred to, and is as a consequence void.

The judgment is reversed, with costs.

Filed Oct. 5, 1886.

No. 12,641.

McCOMAS v. HAAS.

SPECIAL FINDING.—*When will Control General Verdict.*—It is only where the special findings of facts are irreconcilably inconsistent with the general verdict, with all reasonable presumptions in its favor, that the former will control the latter.

EVIDENCE.—*Lost Letter.*—*Proof of Contents.*—Where a letter is shown with reasonable certainty to be relevant and material to the issues in a cause, its contents may be proved by parol, after proof of loss by a fair preponderance of the evidence.

PROMISSORY NOTE.—*Recital that it is Given Subject to Contemporaneous Contract.*—*Negotiability.*—*Showing by Assignee in Order to Recover.*—Where a

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promissory note recites that it "is given in consideration of and is subject to one certain contract existing between" the payee and maker, of even date with the note, it is not, under section 5506, R. S. 1881, negotiable as an inland bill of exchange, nor governed by the law merchant, although payable at a bank in this State, and an assignee of such note before maturity takes it subject to all the equities between the maker and payee, and he can not recover thereon until he has shown that the payee had performed his part of the contract, or, being ready to do so, was prevented by the maker.

SAME.—Contract for Purchase of Machines.—Measure of Damages.—In such case, where the contract recited that the maker of the note had bought of the payee a certain number of hay-forks at a stipulated price each, a certain part to be paid as each machine was ordered and the note given to secure the balance, the measure of damages, in an action on the note and contract, is the difference between the contract price and the market price at the time the machines ought to have been accepted.

From the Montgomery Circuit Court.

T. E. Ballard and *M. E. Clodfelter*, for appellant.

H. M. Billings and *W. S. Moffett*, for appellee.

Howk, C. J.—This is the second appeal to this court in the above entitled cause. The opinion and decision of the court, on the former appeal, are reported under the title of *McComas v. Haas*, 93 Ind. 276. After the cause was remanded, the court below sustained appellant's demurrer to the third paragraph of appellee's answer, in obedience to the mandate of this court. Otherwise, there was no change in the issues in the case. As stated in our opinion on the former appeal, appellant's complaint herein contained two paragraphs. The first paragraph counted upon a promissory note; and in the second paragraph, appellant declared upon the note and a written contract, which were parts of one and the same transaction. Both the note and contract were executed by appellee Haas, to and with one S. B. J. Bryant, and were by him assigned in writing, as alleged, to the appellant McComas.

The issues in the cause were again tried by a jury, and a general verdict was returned for appellee, the defendant below. With their general verdict the jury also returned into

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court their special findings on particular questions of fact, submitted to them by appellant under the direction of the court. Over appellant's motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict, and over his motion for a new trial herein, the court adjudged that he take nothing by his suit, and that appellee recover of him his costs in this suit expended.

Appellant has assigned here as errors the overruling (1) of his motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict, and (2) of his motion for a new trial.

In answer to interrogatories, the jury found specially the following facts: Appellee Haas executed the note and contract mentioned in appellant's complaint; and S. B. J. Bryant, the payee of such note and contract, assigned the same to appellant McComas before the note became due, as averred in the complaint. S. B. J. Bryant furnished and put up, for appellee Haas, one of the Champion horse hay-forks and hay-carriers, mentioned in the contract which is made an exhibit to the second paragraph of the complaint, within the territory described in such contract. Appellee Haas, after the execution of the note and contract mentioned in the complaint, commenced canvassing the territory described in such contract, and attempted to sell the Champion horse hay-fork and hay-carriers to persons residing within such territory. Appellee Haas continued to attempt to sell the Champion horse hay-forks and hay-carriers for about nine months after S. B. J. Bryant had put up one of them within the territory described in the contract, mentioned in the complaint. S. B. J. Bryant, the payee of the note mentioned in the complaint, made false and fraudulent representations to appellee Haas, to induce him to execute the note and contract mentioned in the complaint herein, by falsely and fraudulently representing and claiming that he owned the exclusive right for the Champion horse hay-fork and hay-carrier for the States of Indiana and Michigan; which representations were believed

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and relied upon by appellee Haas, and induced him to execute such note and contract. The note mentioned in the complaint herein was paid, compromised or satisfied the last of June, 1878, at Waynetown, Montgomery county, Indiana, to one Mat. Doherty, the authorized agent of S. B. J. Bryant and Ed. Hardee. S. B. J. Bryant assigned the note, mentioned in the complaint herein, to one Ed. Hardee, in May or June, 1878. S. B. J. Bryant notified appellee Haas that he had assigned the note in suit to one Ed. Hardee; and in May or June, 1878, Ed. Hardee notified appellee Haas that he had purchased the note in suit. Ed. Hardee authorized Mat. Doherty to compromise and settle the note sued upon. Appellee Haas never ordered any of the horse hay-forks and hay-carriers, mentioned in the contract referred to in the complaint.

It is certain, we think, that the court committed no error in overruling appellant's motion for judgment in his favor on the foregoing facts found by the jury, notwithstanding their general verdict. It is settled by our decisions that all reasonable presumptions must be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings of facts. Construing together the foregoing facts, and thus ascertaining their true legal effect, they are not inconsistent, but may be readily reconciled, as it seems to us, with the general verdict of the jury. In such a case, of course, as we have often decided, the general verdict must stand, and judgment must be rendered thereon, without regard to the special findings of facts. Section 547, R. S. 1881; *Amidon v. Gaff*, 24 Ind. 128; *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293; *Cook v. Howe*, 77 Ind. 442; *Lassiter v. Jackman*, 88 Ind. 118; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Lake Erie, etc., R. W. Co. v. Griffin*, ante, p. 464.

A number of causes for a new trial were assigned by appellant, in his motion therefor. Of these causes, we will con-

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sider and pass upon such as his counsel have discussed, in their brief of this case, in the order pursued by them. It is first insisted on behalf of the appellant, that the trial court erred in admitting in evidence, over his objections, the testimony of appellee Haas, giving the contents of a certain letter claimed to have been written by one Ed. Hardee, and to have been delivered to appellee, which letter purported to authorize one Mat. Doherty to compromise appellant's claim with appellee. It is shown by the bill of exceptions appearing in the record, that when appellee as a witness on the trial was asked by his counsel to state what was in the letter, mentioned in this cause for a new trial, appellant objected to the admission of such evidence "on the ground that it was incompetent, irrelevant, immaterial, and that the evidence, sought to be elicited, does not tend to prove or disprove any issue in this cause, and the absence of the letter has not been sufficiently accounted for." Appellee had testified that S. B. J. Bryant, the payee of the note in suit, had notified him in the latter part of June or first of July, 1878, that he, Bryant, had assigned such note to Ed. Hardee, and that Hardee had written him, appellee, a letter about the note, which letter was delivered to him by one Mat. Doherty. It was shown, we think, with reasonable certainty, that this letter was competent, material and relevant to the issues in the cause. For the purpose of showing the loss of the original letter, when asked as to what became of such letter, appellee testified as follows: "It was filed here with the papers; I can't tell what has become of it; when the case went to the Supreme Court, I brought the letters up here and put them on file; that is the last I have seen of it; I hunted all through the clerk's office and failed to find them; I hunted among the papers, and the deputy clerk said they ought to be with the papers; they are not there; I don't know anything about where they are; I can't find them."

This evidence was uncontradicted, and it authorized the court to find, as it must have done, that the original letter

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was lost and could not be produced by the appellee. The loss of the original letter, like any other fact, was to be proved by a fair preponderance of the evidence, and this was done. *Millikan v. State, ex rel.*, 70 Ind. 310; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131. We are of opinion, therefore, that the court did not err in permitting the appellee to give parol evidence of the contents of Ed. Hardee's letter, over appellant's objections.

The only other error of law occurring at the trial, of which appellant's counsel complain in argument, is alleged error in the instructions to the jury, given by the court of its own motion. In his motion for a new trial, appellant assigned the following cause therefor: "3. The court erred in giving the jury, of its own motion, instructions from one to — inclusive, and in giving each of said instructions."

The record before us fails to show that the court, of its own motion, gave the jury more than one instruction, or that the instruction so given was designated by any number. It might well be doubted, therefore, if the cause assigned by appellant for a new trial, and heretofore quoted, was sufficiently certain and specific to direct the attention either of the court below or of this court to the detached sentences, complained of in argument, of the single instruction given. Waiving this point, however, we are of opinion that there is no error in any portion of the instruction, given the jury by the court of its own motion. Appellant's counsel vigorously complain of the following sentence in such instruction: "Under the issues formed by the defendant's denial of the complaint, the plaintiff assumes the burden of proving, among other things, that S. B. J. Bryant, one of the original parties to the contract sued on in this case, being the party through whom the plaintiff derives title as assignee, performed all the stipulations and conditions of such contract on his part, or he must prove that he was ready, able and willing to perform his part of such contract and was prevented from such performance by the refusal of the defend-

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ant to send in his orders and, accept the forks, before he can recover of the defendant."

It is claimed by appellant's counsel, as we understand their argument, that this portion of the court's instruction was clearly erroneous because, by its terms, it is applicable to the issue formed on the entire complaint; whereas, it is claimed to be wholly inapplicable to the issue joined on the first paragraph of the complaint, which counted, as we have seen, upon appellee's promissory note. Counsel claim that appellee's promise to pay the sum of money, evidenced by his note, was absolute and wholly independent of the terms and conditions of the agreement, executed contemporaneously with his execution of such note by him and by S. B. J. Bryant, the payee of the note and the assignor of appellant. This position is untenable. We have already said that the note and the agreement were parts of one and the same transaction. That this is so is clearly shown by the last clause of such note, of the following tenor, to wit: "This note is given in consideration of, and is subject to, one certain contract existing between S. B. J. Bryant and Jacob Haas, of even date with this." Although the note in suit was, by its terms, payable at a bank in this State, with the clause or condition quoted on its face, it was not negotiable as an inland bill of exchange and was not governed by the law merchant; but the appellant, as the assignee thereof before maturity, took such note subject to all the equities existing between the appellee as its maker, and S. B. J. Bryant as the payee and assignor thereof. Section 5506, R. S. 1881; *Glidden v. Henry*, 104 Ind. 278.

By the express terms of the note, the contract of S. B. J. Bryant is made the consideration of such note. It is clear, therefore, that there could be no recovery on the note or contract by Bryant, or by appellant as his assignee, until it was shown that Bryant had performed his part of such contract, or that being able, ready and willing to perform, performance on his part was prevented by the acts of appellee. So the

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court, of its own motion, instructed the jury as above quoted, and there is no error in such instruction.

Appellant's counsel also complain of the following portion of the instruction, given by the court of its own motion, to wit: "If the jury find for the plaintiff, the measure of his damages will be the difference between the contract price of the fifty hay-forks, mentioned in such contract, and the market price of the same at the time they ought to have been accepted." There is no error, we think, in this portion of the court's instruction. It was applicable to the case made by the evidence, and, in the event of a finding for appellant, correctly stated the rule for the measure of his damages. In the contract sued upon, it was recited that appellee had bought of S. B. J. Bryant "fifty of his horse hay-forks and hay-carriers, at \$22.50 each," of which price \$10 was to be paid as each machine was ordered, and that the note in suit was given to secure Bryant in the payment of the balance of such contract price. It was not shown by the evidence that Bryant had ever delivered or offered to deliver any of such machines to the appellee, or that he had ever been able, ready or willing to make such delivery, or that he had ever performed or offered to perform any of the stipulations of the contract sued upon, on his part to be kept and performed. In this state of the record, we are of opinion that appellant has no cause to complain of the instruction given by the court of its own motion, or of any part thereof.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Oct. 6, 1886.

Kirkpatrick v. Pearce.

No. 13,159.

KIRKPATRICK v. PEARCE.

FREE GRAVEL ROAD.—*Lien of Assessment.*—*When it Attaches.*—Under sections 5095–5097, R. S. 1881, the lien of an assessment for the construction of a free gravel road attaches as of the day of the final order of the county board confirming the report of the committee appointed to apportion the expenses of construction, and it is unaffected, except as to the amount, by any reductions or additions made by the county auditor under section 5096.

REAL ESTATE.—*Conveyance.*→*Encumbrance.*—*Free Gravel Road Assessment.*—*Breach of Covenant.*—*Burden of Proof.*—A grantee, to whom land has been conveyed with a covenant against encumbrances, who claims to have paid a gravel road assessment and seeks to recover the amount from the grantor, must show that such assessment was a valid and subsisting encumbrance when the deed was executed.

SAME.—*Evidence.*—*Gravel Road Duplicate.*—In such case, the gravel road duplicate is not sufficient evidence of the fact that an assessment was a valid and subsisting lien at the time of the conveyance, but it must be made to appear, at least, that there was a proceeding resulting in the assessment. Section 6493, R. S. 1881, does not cover a case of this kind.

From the Hamilton Circuit Court.

R. R. Stephenson and *W. R. Fertig*, for appellant.

A. N. Grant and *B. C. H. Moon*, for appellee.

ZOLLARS, J.—Section 5095, R. S. 1881, provides that when any of the lands to be assessed as benefited by the construction of a free gravel road, are subject to a life-estate, the assessment made thereon shall be apportioned between the owner of the life-estate and the owner of the fee, in proportion to the relative value of their respective estates, such proportion to be ascertained upon the principle applicable to life annuities. Section 5096 provides for the apportionment of the expenses of constructing the road, upon the lands benefited, by three freeholders, and for the confirmation of their report by the board of county commissioners. The latter part of the section is as follows:

“The final action of the commissioners shall be entered upon their records, together with the report as confirmed, showing how the said estimated expense has been apportioned

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upon the land ordered to be assessed as aforesaid. The county auditor, before placing the said assessment upon the duplicate, shall reduce or add to the same, *pro rata*, the amount the actual expense shall be found to be, more or less than the said estimate. The said assessment upon lands, under the provisions of this act, shall be placed upon a special duplicate, to be provided by the county auditor at the expense of the county for that purpose; and such assessment shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are," etc.

Section 5097 authorizes the issue and sale of county bonds maturing at annual intervals of two years, and not beyond eight years, with interest payable semi-annually. It further provides as follows: "Said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, and so be placed upon the duplicate for taxation against the lands assessed, and collected in the same manner as other taxes; and when collected, the money arising therefrom shall be applied to no other purpose than the payment of said bonds and interest."

The case before us involves the question as to when the assessments become liens upon the lands assessed. Do they become liens at the time the final order is made by the county board confirming the report by the committee, or when the assessments are entered upon the special duplicate by the county auditor, or do the liens relate back and attach as of the 1st of April, as ordinary general taxes?

A general tax, levied for governmental purposes, relates back, and binds the real estate from the 1st of April, by force of a statutory provision. Section 6446, R. S. 1881; *Overstreet v. Dobson*, 28 Ind. 256; *Cooley Taxation* (1st ed.), p. 306; 2 Wait Action and Def. 377.

Such taxes are levied each year, and hence persons who sell lands upon or after the 1st day of April, with covenants of warranty, are bound to know that they will be bound for the taxes of the current year. Assessments for free gravel

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roads are the result of special proceedings which can not be certainly anticipated, and hence it would be unreasonable to hold that the vendor of real estate should be liable for such assessments imposed after the sale.

These assessments are to constitute and be considered first liens upon the real estate assessed, in the same manner as other taxes are. The word "manner," in the connection in which it is used, should be interpreted "extent." Properly construed, the section makes such assessments liens upon the real estate assessed to the same extent as other taxes are.

Such special assessments are sustained upon the ground that while the few are made to bear the cost of a public work, their property is increased in value by the expenditure, to an amount equal to the sum they are required to pay, and hence the person who owns the land when it is assessed, is supposed to receive a benefit by its increased value, equal to the amount of the assessment imposed. *Cooley Taxation* (1st ed.), p. 417; *Lipes v. Hand*, 104 Ind. 503. It is upon this theory that the assessments are to be apportioned between the owner of the life-estate and the owner of the fee.

Under the above sections of the statute, the whole of the assessment goes upon the special duplicate at the same time; but for the purpose of lightening the burden, and at the same time meeting the payment of the principal and interest of the bonds as they become due, it is divided up so that a certain portion is to be collected each year. The whole of it, however, is a present lien upon the land just the same as though it were all to be collected at the same time.

We think, too, that the lien of the assessments attaches as of the day of the final order of the county board confirming the report of the committee, which is in the nature of a final judgment. *Stoddard v. Johnson*, 75 Ind. 20.

The action of the auditor in placing the assessments upon the duplicate, is ministerial. If the lien did not attach until that duty should be performed by the auditor, he would have it in his power to postpone the lien by neglecting to place

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the assessments upon the duplicate. He is to deduct from or add to the assessments an amount that will make them equal to the cost of the work.

It is not to be supposed that the amounts to be thus added or deducted will be very large, as it is the duty of the committee to make the assessments to meet the estimated expenses. If he deducts any amount from the assessments, of course, the lien is reduced that much. If he adds an amount, by force of the statute, the amount so added becomes a lien as a part of the assessment.

By a deed containing a covenant of warranty against encumbrances, appellant conveyed to appellee certain lands on the 20th day of February, 1882. Appellee brought this action, alleging in his complaint a breach of that covenant, in that, at the time of the conveyance, there was a free gravel road assessment against the land, which was a lien upon it, and which he has since paid. As shown by the record, the following is the whole of the evidence introduced by appellee to sustain his allegation in relation to the assessment and lien upon the land, viz.:

"I, Henry L. Moreland, county auditor within and for said Howard county, do hereby certify that the within and foregoing is the Albright Free Gravel Road duplicate for the year 1881; that the same contains a list of the assessments made for the construction of said gravel road; that the taxes for the year 1881, is the one-fourth of the assessment of benefits, and that said amount of one-fourth is divided into two instalments on April and November; that the benefits as shown upon this duplicate include twenty per cent. of the original assessment that was added by me as auditor of Howard county, for the purpose of providing money to pay four years' interest on the bonds issued for the purpose of raising money to construct said gravel road; that said taxes for the year 1881 were placed upon this duplicate for collection in pursuance of an order of the board of commissioners of

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Howard county, Indiana. Witness my hand and seal this 28th day of November, 1881.

"HENRY L. MORELAND, [SEAL].

"Auditor of Howard County."

Mr. Grant: "I will now read from the duplicate simply what appears in the name of Kirkpatrick." Same read in evidence to the court from the tax duplicate, and is in the words and figures, to wit:

Mr. Grant (reading): "On page 64 appears the name of John M. Kirkpatrick, opposite which the following described lands, being the same described in the deed; * * * amount assessed upon the described real estate opposite Kirkpatrick's name is \$360; the tax is \$360, and the taxes and benefits are the same."

Appellant objected to this evidence, because appellee did not accompany it with, and would not consent to accompany it with proof of the proceedings for the establishment of the free gravel road, under which the assessment was made, to show that it was regular, authorized by law, and valid.

These objections were overruled, and the evidence admitted. Appellant now contends that the court below erred in overruling his objections and admitting the evidence, and that the evidence is not sufficient to sustain the finding and judgment against him.

The burden was upon appellee to make good, by competent proof, his averment that at the time the conveyance was made to him, there was a free gravel road assessment against the land which was a lien upon it. *Abbott Trial Ev.*, p. 520, section 36; *Rawle Cov. for Title*, pp. 114, 194; *Bailey Onus Prob.* p. 65; *Crance v. Collenbaugh*, 47 Ind. 250; *Walton v. Cox*, 67 Ind. 164.

In the case of *Barker v. Hobbs*, 6 Ind. 385, it was held, as correctly stated in the syllabus, that "A grantee to whom land has been conveyed with a covenant against incumbrances, who claims to have discharged an incumbrance after the execution of the conveyance, must show that it was a valid

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and subsisting encumbrance when the deed was executed."

The case of *Robinson v. Murphy*, 33 Ind. 482, like this, was an action for a breach of a covenant against encumbrances, and the alleged breach was, that at the time of the execution of the deed, there were taxes against the real estate, which the grantee was compelled to pay. It was held that the burden was upon the grantee and plaintiff to show by proper evidence the listing and appraisal of the property, and the action of the proper authorities in fixing the rate of taxation; and, in short, that the taxes were a valid and subsisting lien on the property at the time of making the deed. To substantially the same effect see the case of *Cook v. Fuson*, 66 Ind. 521.

Appellee, however, relies upon section 6493, R. S. 1881, as establishing a different rule. That section is one of the sections of article 26 of the tax law in relation to the collection of delinquent taxes by suit instituted by the prosecuting attorney. It is as follows: "In such suits and in all other suits, and for any purpose of evidence or authentication, the records made by the county auditors respecting delinquent lands, the manner of advertisement of sales thereof, the sales made of the same, the conveyances thereof executed, and all copies of such records, or of any other papers required by this act to be made out, duly certified to be such by the proper county auditor under his seal of office, shall be received as *prima facie* evidence of the facts contained therein."

Whatever may be the correct interpretation of the above section of the statute, as applied to cases where the alleged encumbrance is an ordinary tax, in our judgment, it is not broad enough to cover the case before us. It will be observed that the records, made *prima facie* evidence by the section, are the records made by the auditor respecting delinquent lands and the sale thereof.

The duplicate introduced in evidence in this case is not a delinquent list, nor is it a duplicate of ordinary taxes. It is a special duplicate provided for free gravel road assessments,

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and does not come within the letter or spirit of the above section of the statute. *Brosemer v. Kelsey*, 106 Ind. 504. These gravel road assessments are not taxes in the ordinary and full sense of that term. *Palmer v. Stumph*, 29 Ind. 329. They are to be collected as other taxes are collected, and for that purpose are to be treated as taxes. *Brosemer v. Kelsey*, *supra*; *Bothwell v. Millikan*, 104 Ind. 162. But in order that they may be thus collected, they must have been legally assessed. It should be made to appear, at least, that there was a proceeding resulting in the assessment; that the jurisdiction of the county board over the subject was invoked by a petition, and that the county board, by a final order, confirmed the assessment made by the committee.

The portion of the gravel road duplicate introduced in evidence in this case, of itself and alone, did not establish, or tend to establish these facts, and of itself and alone was not competent evidence. It results that the court below erred in overruling appellant's motion for a new trial, and that the judgment, for that reason, must be reversed.

It should be observed in passing, that the rule as laid down in the cases of *Robinson v. Murphy*, *supra*, and *Barker v. Hobbs*, *supra*, would not be enforced to its full extent in cases where the alleged encumbrance is an ordinary tax, for the reason that the tax laws now in force have, to some extent, thrown upon the land-owner the burden of showing that taxes assessed against his lands have not been properly assessed.

Judgment reversed, at appellee's cost, and cause remanded, with instruction to the court below to sustain appellant's motion for a new trial.

Filed Sept. 25, 1886.

Daugherty v. Deardorf.

No. 11,440.

DAUGHERTY v. DEARDORF.

DESCENT.—*Widow Taking Whole of Husband's Land.*—*Action for Possession.*—*Evidence.*—*Burden of Proof.*—Under section 2490, R. S. 1881, a widow who is entitled to all the real estate of which her husband died the owner, in case he left no surviving child or father or mother, must, in an action by her for possession, prove that there are no such survivors.

MORTGAGE.—*Foreclosure.*—*Parties.*—*Owner of Equity of Redemption.*—An owner or holder of the equity of redemption from the mortgagor or a mesne purchaser, is as necessary a defendant to a suit to foreclose as a mortgagor still owning the land, and if not made a party the decree is void as to him.

From the Fulton Circuit Court.

S. Keith, for appellant.*I. Conner, M. L. Essick and O. F. Montgomery*, for appellee.

ELLIOTT, J.—The appellee was the widow of Andrew J. Daugherty, who died the owner of the land in controversy, and under our statute she would have inherited all of the real estate of her deceased husband if he had left surviving him no child and no father or mother. R. S. 1881, section 2490. But in order to entitle her to recover in an action prosecuted by her for the possession of land, upon the theory that she was entitled to it as the widow of her husband, it was incumbent upon her to prove that her husband left no father or mother and no children surviving him. This conclusion results from the old and familiar rule that a plaintiff in ejectment must recover on the strength of his own title. It was, therefore, error for the court to instruct the jury, as it did, in effect, that she was entitled to recover if she proved that she was the widow of Andrew J. Daugherty, and that he died the owner of the land. If the case is to be regarded as resting on the theory that the appellee was entitled to all the land in virtue of her rights as widow, the judgment must be reversed; but it is contended that she had an additional title derived from another source, and if that title is sufficient to entitle her to recover, the error in the instruction was a harm-

107	537
127	75
107	537
121	190
107	527
153	535

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less one. We concur in the view of counsel, that if the evidence clearly shows that the appellee did have another valid title, the error in the instruction can not reverse the judgment.

The title which the appellee seems to have really relied upon was one derived through a sheriff's sale, and if that title was a valid one the judgment should stand, notwithstanding the erroneous instruction to which we have referred. The sheriff's sale was made on a decree of foreclosure rendered in a suit brought by Eli R. Hernan in August, 1871, on a mortgage executed by Alexander Dane and Sophia Dane, in June, 1865. The mortgagors and Frisby Nye, but no others, were made parties to the suit. On the 18th day of February, 1867, Alexander and Sophia Dane conveyed the land to James M. and Andrew J. Daugherty, and in September, 1867, James M. conveyed to Andrew J. Daugherty. It thus appears that when the foreclosure suit was commenced Andrew J. Daugherty was the owner of the land by virtue of a deed executed in 1867. This decree was void, as to the owners of the land, for it is a well established rule that if the owners of the mortgaged premises are not made parties to the suit the decree is void as to them. *Petry v. Ambroscher*, 100 Ind. 510; *Curtis v. Gooding*, 99 Ind. 45; *Marvin v. Taylor*, 27 Ind. 73; *Stevens v. Campbell*, 21 Ind. 471; *Burkham v. Beaver*, 17 Ind. 367; *Shaw v. Hoadley*, 8 Blackf. 165; 2 Jones Mortg., sections 1290, 1292; Story Eq. Pl. 197; Pomeroy Remedies, sections 330, 336.

A recent writer, in discussing this question, says: "An owner or holder of the equity of redemption by purchase from the mortgagor or a mesne purchaser is as necessary a defendant to a foreclosure as a mortgagor still owning the mortgaged premises." *Wiltie Mortg. Foreclosures*, 85. Decisions from almost all the courts of the country are cited in support of this doctrine, and, in our opinion, it is not only well supported by authority, but it is the only doctrine defensible on principle. It is a familiar principle of Ameri-

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can law, that the mortgagor remains the owner of the fee, and the mortgagee simply acquires a lien on the land; it would therefore be a perversion of justice to permit the vendee of the mortgagor, the owner of the fee, to be divested of his land by a suit to which he was not a party.

The case of *Cline v. Inlow*, 14 Ind. 419, has been cited as opposed to the doctrine of the later and earlier cases in our reports, but it can not be justly regarded as in conflict with them, for all that is there really decided is that an answer by the mortgagor that he had sold the land was bad, for the reason that it did not respond to that part of the complaint which demanded a personal judgment.

The decision in *Sumner v. Coleman*, 20 Ind. 486, is in conflict with the earlier and the later cases, but it is a case so little considered that it could not be regarded of great weight, even if not in conflict with other decisions, for all that is said upon the question is, "Sumner would have been a proper, but was not a necessary party of record, to that suit."

As the heirs of Andrew J. Daugherty were not parties to the foreclosure suit, no interest of theirs was impaired, and no title vested in the purchaser at the sale on the decree, so that the vendee of the purchaser acquired no title as against them.

It is, however, argued that as the appellee was the only heir no one else can complain. This argument might, perhaps, be valid if there was any evidence that she was the sole heir, but there is no such evidence in the record. As the appellee must recover upon the strength of her own title, and not upon the weakness of her adversary's, it was essential to the validity of her title under the sheriff's sale to show that her husband left neither father nor mother nor children.

Judgment reversed.

Filed Oct. 6, 1886.

 Carrothers *et al.* v. Carrothers.

No. 12,670.

CARROTHERS ET AL. v. CARROTHERS.

ABATEMENT.—*Vexatious Action.*—*Costs of Former Action.*—Where a second action is vexatiously brought by and between the same parties for the same cause, the proceedings in the second action will be abated until the costs of the former action are paid.

SAME.—*Presumption as to Vexatious Character.*—It will be presumed in such case, in the absence of a showing to the contrary, that the second action is vexatious.

PLEADING.—*Striking Out.*—*Record.*—*Bill of Exceptions.*—*Supreme Court.*—Where a pleading has been rejected, or a part stricken out, the pleading or the part stricken out will not thereafter constitute a part of the record on appeal to the Supreme Court, unless embodied in a bill of exceptions, or made so by an order of the trial court.

JUDGMENT.—*Objections to Must be Made in Trial Court.*—*Supreme Court.*—Objections to the form or substance of a judgment or order can not be made in the Supreme Court for the first time; and if not made in the trial court, or unless some motion to modify or amend be there interposed, they are not available for reversal, however erroneous the judgment or order may appear to be.

From the Marshall Circuit Court.

H. Corbin and *C. Kellison*, for appellants.

A. C. Capron and *M. A. O. Packard*, for appellee.

Howk, C. J.—The first error assigned by the appellants, upon the record of this cause, is the overruling of their demurrer to appellee's plea in abatement herein.

It is shown by the record of this cause, that prior to the October term, 1882, of the court below, the appellants herein commenced an action against appellee, in such court, to obtain the partition of certain described real estate in Marshall county, and to have the title to their share of such real estate quieted in them as against the appellee; that appellee appeared to such action and filed his answer and cross complaint therein; that the cause was then fully heard by the court, and taken under advisement; and that afterwards, and before the court had announced its finding and decree therein, the appellants, with leave of the court first had, dismissed

107	530
140	348
107	530
149	389
150	656
107	530
157	533
107	530
161	651

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their said action at their costs, and judgment was rendered against them in appellee's favor for his costs therein. Thereafter, to wit, on the 14th day of April, 1884, appellants filed their complaint in the court below in the pending suit, alleging in such complaint that they were the owners of the same share or interest in the same real estate as that described in their complaint, in their previous suit, and praying as before that their share in such real estate might be set off to them in severalty, and that their title thereto might be forever quieted in them as against the appellee.

To this latter complaint, appellee answered in abatement of the pending suit, that theretofore, on the 25th day of July, 1882, appellants brought an action in the court below against appellee for equitable relief and for partition of real estate, which said action was in all respects identical with the action in this case, and was founded on the same facts and same cause of action as that stated in the complaint herein; that the aforesaid cause was heard by the court, a full trial had, a large number of witnesses were examined, and the case fully argued by counsel on both sides; and that the court in rendering judgment having indicated that its finding and decree would be in favor of appellee, thereupon the appellants dismissed their said action; that a large amount of costs had been made in said case, and, upon the dismissal thereof, appellee had judgment against appellants for his costs therein, in the sum of \$47.90, which said costs and judgment remained wholly unpaid. Wherefore appellee prayed that the pending suit abate, and that appellants be restrained from enforcing their said cause of action until such costs were fully paid.

Appellants' demurrer to this answer or plea in abatement was overruled by the court, and this ruling is the first alleged error.

The ruling complained of was not erroneous. The doctrine is well established, and has been recognized and acted upon by this court, that where a second action is vexatiously

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brought by and between the same parties for the same cause, the court will, by order, stay the proceedings in the second action, until the costs of the former action shall be paid. In such case, it will be presumed that the second action is vexatiously brought, in the absence of any sufficient showing to the contrary. *State, ex rel., v. Howe*, 64 Ind. 18; *Kitts v. Willson*, 89 Ind. 95; *Harless v. Petty*, 98 Ind. 53. In their brief of this cause, appellants' counsel have virtually conceded that the error under consideration is not well assigned, and have waived the decision of the question thereby presented.

The next error assigned by appellants is the sustaining of a motion to strike out certain parts of their reply to appellee's answer in abatement, and certain affidavits filed with their reply. The point is made by appellee's counsel, and is vigorously insisted upon, that this supposed error is not so saved in the record of this cause as to present any question for our consideration and decision. We fully concur with appellee's counsel in this view of the matter. It is well settled by our decisions, that where a motion to reject or strike out a pleading, or some part thereof, has been sustained, such pleading or part thereof will not thereafter constitute any part of the record, on an appeal to this court, unless it is made so by a bill of exceptions or an order of court. *Berlin v. Oglesbee*, 65 Ind. 308; *Dunn v. Tousey*, 80 Ind. 288; *Peck v. Board, etc.*, 87 Ind. 221; *Scotten v. Randolph*, 96 Ind. 581; *Scott v. Board, etc.*, 101 Ind. 42.

So much of appellants' reply to appellee's answer in abatement as the court struck out and rejected, on his motion, was not made part of the record of this cause, either by a bill of exceptions or by an order of court. It was apparently intended to make the rejected portions of the reply a part of the record, by embodying the same in a bill of exceptions, but this was not done. At the point in the bill of exceptions where, as we may suppose, it was intended that the rejected portions of the reply should be copied, they were not copied, nor was there any "here insert," as required by section 626,

R. S. 1881, in such bill of exceptions, to designate the place where the rejected portions of the reply might be inserted therein. In lieu of such portions of the reply, there is a memorandum apparently made by the clerk of the court below, but manifestly without any authority whatever from such court or the judge thereof, to the effect, substantially, that such clerk believes that the rejected parts of such reply may be found on certain pages of the transcript before us, but wholly outside of the bill of exceptions. We need not argue for the purpose of showing that the rejected portions of the reply were not and could not be made parts of the record of this cause by the memoranda of the clerk below, or by his reference to matters which he had previously copied into the transcript, without any warrant or authority of law. After the court had sustained appellee's motion, and had struck out certain parts of appellants' reply, the action of the clerk of such court, in copying the rejected portions of such reply into the transcript, was wholly unauthorized by law, and did not make them, in any legal sense, parts of the record. Where a pleading has been rejected, or a part thereof has been struck out, it will not thereafter constitute any part of the record for any purpose, on an appeal to this court, unless it be embodied in a bill of exceptions, duly signed and filed, or be made a part of such record by an order of the court. *Shields v. McMahan*, 101 Ind. 591.

In the absence from the record of the rejected portions of appellants' reply, we can not say that the court erred in sustaining appellee's motion to strike out such parts of the reply; and in such case, of course, as we have often decided, the presumption must prevail that the ruling complained of was not erroneous. *Myers v. Murphy*, 60 Ind. 282; *Foster v. Ward*, 75 Ind. 594; *Peck v. Board, etc.*, *supra*.

Finally, it is assigned as error here that the circuit court erred in making an order and rendering a decree upon the hearing of this cause, staying proceedings herein, absolutely and perpetually. This error, conceding it to be such, as we

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well may, is not so saved in and presented by the record before us, as that we can either reverse or modify the decree and order of the circuit court. Appellants failed to move the court for a new trial or hearing of the cause; they did not ask the court to amend or modify its decree and order herein; and they neither objected nor excepted to the form or substance of such order and decree. We have uniformly held that objections to the form or substance of a judgment, decree or order of the trial court, can not be made here for the first time; and that unless such objections be made below, or some motion be there made to modify or amend the judgment, order or decree, the objections can not be made available for reversal here, however erroneous in form or substance such judgment, order or decree may appear to be. *Smith v. Tatman*, 71 Ind. 171; *Teal v. Spangler*, 72 Ind. 380; *Smith v. Kyler*, 74 Ind. 575; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *American Ins. Co. v. Gibson*, 104 Ind. 336.

We have found no available error in the record of this cause.

The judgment is affirmed, with costs.

Filed Oct. 6, 1886.

No. 12,011.

BIXEL v. BIXEL.

CONVERSION.—*Personal Property.*—*Sale.*—*Misapplication of Proceeds.*—*Liability.*—Where one takes possession of and sells personal property at the direction of the owner, but fails to properly apply or misapplies the proceeds, there is no conversion of the property, and his liability must be predicated on the misapplication or conversion of the proceeds.

SAME.—*Complaint.*—*Evidence.*—Under a complaint charging a conversion of property merely, there can be no recovery for a misapplication or conversion of the proceeds of a sale of the property, and evidence of a conversion or misapplication of the proceeds is not admissible.

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PLEADING.—*Forms of Action.*—*Recovery.*—The code of this State consolidates all forms of action into one denominated a civil action, but that does not affect the remedy nor authorize a recovery beyond the case made by the complaint.

From the Marshall Circuit Court.

E. C. Martindale and *V. Kirk*, for appellant.

M. A. O. Packard, *O. M. Packard* and *A. C. Capron*, for appellee.

ZOLLARS, J.—Appellant charges in his complaint, that in the year 1878 appellee wrongfully and unlawfully took possession of, and converted to his own use, wheat, corn, horses, hogs, cattle, a wagon, harness, and \$120 in money, the property of appellant.

In his answer, appellee admits that he received from appellant the property described in the complaint, except the money, which he denies having received, and avers that the number of bushels of wheat and corn is overstated in the complaint. It is further averred in the answer, that appellant, being compelled to be absent, put the property into the possession of appellee, with instructions to care for and sell it, and apply the proceeds in payment of appellant's debts; that he did sell it, with the exception of some of the hogs that died, and applied the proceeds as directed.

The evidence is such as to make it incumbent upon this court to accept as an established fact, that appellee did not take possession of the property in 1878, either wrongfully or unlawfully, but, on the contrary, took possession of and sold it by the direction of appellant.

The case is prosecuted and defended upon two theories. Appellant contends that notwithstanding the fact that the possession and sale of the property by appellee were with his consent and under his direction, he may recover in this action the value of the property, because it is not shown that appellee applied the proceeds of the sales to the payment of his, appellant's debts.

Bixel v. Bixel.

Appellee's contention is, that the gravamen of the action is the wrongful conversion of the property, and not of the proceeds of the sales thereof, and that hence appellant can not recover in this action, because it is not shown that the possession and sale of the property were wrongful.

But for the code abolishing distinct forms of action, this would be an action of trover. In such a case, the plaintiff, in order to recover, must show that the property described in the declaration has been wrongfully converted by the defendant. It has been said that where there has been such a conversion by a sale of the property, the plaintiff may maintain trover, or he may dispense with the wrong and suppose the sale made by his consent, and bring an action for the money for which the property was sold, as money received to his use. *Cooley Torts*, pp. 92-3; *Murray v. Burling*, 10 Johns. 172. Both of these remedies could not be sought in the same action. *Palmer v. Jarmain*, 2 M. & W. 282.

The holding in that case is correctly stated in the syllabus, as follows: "If a party, authorized by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he can not be sued in trover for the bill, but must be sued for money had and received."

The case of *Goss v. Emerson*, 3 Foster (N. H.) 38, was for the alleged conversion of promissory notes. The notes were placed in the hands of the defendant as collateral security. He transferred the notes to another, who collected them. It was held, that as the defendant came rightfully into the possession of the notes, and had a right to transfer his interest in them, he could not be made liable for what had been collected upon them in an action of trover for their wrongful conversion. It was said: "It is the written instrument, and not the money due on it, the security and not the debt, that is the subject of the action." See, also, 6 Wait Actions and Def., p. 183; *Hodges v. Lathrop*, 1 Sandf. 46; *Kellogg v. Fox*, 45 Vt. 348.

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The case of *Lavery v. Snethen*, 68 N. Y. 522 (23 Am. R. 184), cited by counsel for appellant, is not opposed to the above cases, but in harmony with them. In that case it was said: "The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, * * * he is not liable for a conversion of the property, but only in an action on the case for misconduct."

If a person, having authority from the owner to sell the property and apply the proceeds, sells the property, and misapplies or converts the proceeds, he is liable for such misapplication or conversion, but does not become a wrong-doer *ab initio*.

In the possession and sale of the property, appellee was in no way a wrong-doer, because he was acting under authority from appellant. His wrong, if he was in fact guilty of any wrong, was in not applying the proceeds of the sale as directed, and that wrong was subsequent to the possession and sale. He is not, therefore, liable for having converted the property. As we have said, the code consolidated all forms of action into one, denominated a civil action, but that does not affect the remedy, nor does it authorize a recovery in any case beyond the case made by the complaint. The code requires that the complaint shall contain a statement of the facts constituting the cause of action, in plain and concise language (R. S. 1881, section 338), and it has always been held that the plaintiff must recover *secundum allegata et probata*, or not at all. *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339; *Paris v. Strong*, 51 Ind. 339; *Boardman v. Griffin*, 52 Ind. 101; *Louisville, etc., R. W. Co. v. Godman*, 104 Ind. 490 (494); *Brown v. Will*, 103 Ind. 71; *Hasselman v. Carroll*, 102 Ind. 153; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160.

In this case, the complaint charges a conversion of the

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property and nothing more. There is no charge nor intimation, that appellee converted the proceeds of the sale of the property. There not only having been no proof of a conversion of the property, but proof to the contrary, appellant was not and is not entitled to recover. For the purpose of showing that appellee had not applied the proceeds of the sale of the property as directed, appellant offered to prove by his own testimony the amount of his indebtedness when he left, and the amount when he returned, after appellee had sold the property. There was no error in excluding the offered testimony, for the reason that it was immaterial, there being no issue to which it was applicable.

Appellee's answer was in the nature of an argumentative denial, and in no event would it change the case as made by the complaint. See *Leary v. Moran*, 106 Ind. 560.

The court below adopted appellee's theory as to the nature of the case, and charged the jury, that if they should find from the evidence that appellant placed the property in the care and custody of appellee, with instructions to sell it and apply the proceeds to the payment of his, appellant's, debts, and that appellee sold it, there could be no recovery in appellant's favor, although appellee may have failed to apply the proceeds as directed; in short, that under the allegations of the complaint, appellant must recover for a conversion of the property or not at all, and that a failure to properly apply, or a misapplication of the proceeds of the sale of the property, did not amount to a conversion of the property.

These instructions were all proper and applicable to the case as made by the complaint and the evidence. Appellant's instructions upon the opposite theory were properly refused.

Complaint is made that the court did not fully and definitely define to the jury the meaning of the term *conversion*. If appellant desired fuller instructions, he should have asked them. *Powers v. State*, 87 Ind. 144.

It is contended further, that the judgment against appellant for costs should be reversed, because the evidence shows

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that appellee, without authority so to do, sold some of appellant's wheat in 1879. A sufficient answer is, that the complaint does not charge any such sale, and the evidence shows that the same was authorized or ratified by appellant.

We have examined all of the questions discussed by appellant's counsel, and find no error presented by the record that would justify a reversal of the judgment.

Judgment affirmed, with costs.

Filed Oct. 5, 1886.

No. 13,168.

MOWRER v. THE STATE.

INJUNCTION.—Contempt.—Jurisdiction of Special Judge.—A special judge, appointed to hear and determine a particular case, has jurisdiction to punish a party for a violation of a restraining order previously granted by the regular judge.

SAME.—Interference with Status of Personal Property.—When no Contempt.—Where, during the pendency of an action respecting the ownership and custody of a piano, "the defendant and all other persons" are enjoined from removing it from the defendant's house, where it is situate, but the defendant, before the action is determined, and without reporting his intention to the court, rents his house and moves to another State, leaving the piano in the house, but making no arrangement for its storage, the plaintiff may remove the instrument to his own house for safe-keeping without being guilty of contempt.

From the Henry Circuit Court.

J. Brown, W. A. Brown, J. B. Julian and J. F. Julian, for appellant.

NIBLACK, J.—On the 10th day of April, 1886, John M. Mowrer filed his complaint in the court below against Asa Hatch, averring that he and the said Hatch were jointly the owners of a piano-forte of the value of \$400, each owning a one-half interest therein; that said piano was then, and for

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four years then last past had been, in the exclusive possession of him, the said Hatch; that the said Hatch would not consent that he, the plaintiff, should at any time have the possession or use of such piano, or agree to sell or rent the same; that the rental value of the piano was and had been \$60 per year; that said piano was detained at the residence of Hatch at Newcastle, in Henry county. The plaintiff demanded that a receiver be appointed to take possession of the piano and to make sale thereof; also an accounting between the parties.

On the 17th day of April, 1886, the parties appeared before the judge of the Henry Circuit Court at chambers, in Newcastle, when an order in the cause was entered in the following words: "It is ordered by the court that the property in controversy in the above cause be and remain where it now is until the further order of the court, and that the defendant, and all other persons, be restrained and enjoined from removing the same from the place where it now is, or interfering with it, until the determination of said action, or the further order of the court."

At the ensuing term of the circuit court above named, the regular judge declined to preside in the cause, and appointed Thomas B. Redding, Esq., a practicing attorney of that court, special judge to hear and determine the controversy between the parties. Redding qualified and assumed jurisdiction of the cause.

At a later day in the term, William O. Barnard and Eugene H. Bundy, as attorneys for Hatch, filed their affidavit in the court below, charging that Mowrer, the plaintiff, had, on the 20th day of May, 1886, caused the property in controversy to be removed from the house and residence of the defendant Hatch, where it was ordered to be left and to remain, to the house and residence of him, the plaintiff, and that the plaintiff then had the possession of, and detained such property without right and in violation of the order previously made in the cause by the regular judge, as herein above stated.

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Redding, acting as special judge for the occasion, entered a rule against the plaintiff requiring him to return the piano to the place from which it had been removed, or to show cause why he should not be attached for contempt in disregarding the order of the court.

The plaintiff, appearing in answer to the rule, moved to set aside the order granting it, and to quash the proceedings against him as for a contempt, upon the ground that such proceedings were separate and distinct from the original action, and that consequently the appointment of Redding as special judge in such original action did not confer upon him jurisdiction over the alleged offence charged by the affidavit of Barnard and Bundy, but the plaintiff's motion was overruled. The plaintiff then answered, under oath, that at the time the restraining order herein above set out was made, the piano was in the possession, and in the house, of the defendant Hatch, at Newcastle; that soon after the entry of such restraining order, Hatch vacated his house at Newcastle, leaving the building unoccupied and the piano remaining within it, and removed to, and took up his residence at Springfield, in the State of Ohio; that the piano was a valuable instrument, and his, the plaintiff's, interest therein needed proper protection; that Hatch had rented his house to one Harden for one year, without reserving any right of storage for the piano; that the house remained unoccupied for some time, after which Harden moved his family into it, and found the piano standing in one of the rooms; that Harden was unwilling to give the piano house-room unless he could have the full use of it; that as Harden found no one who felt authorized to grant him the use of it, he informed the plaintiff that he wanted the piano taken away from the house; that the plaintiff thereupon took charge of the piano and removed it a distance of two or three squares to his own house for safe-keeping; that Hatch had filed his answer in the original action, disclaiming all interest in the piano, except

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as the treasurer and custodian in behalf of the Philharmonic Society of Newcastle.

The court, acting through Redding as special judge, held Mowrer's answer to be insufficient to excuse him for disobedience of the authority of the court in removing the piano from the place at which it had been left by Hatch, and assessed a fine against him in the sum of \$25 as for a contempt for such disobedience. It was also made a part of the judgment that the sheriff should take the piano from the possession of Mowrer and return it to the house and place from which it had been taken by him.

Mowrer reserved questions upon the summary proceedings thus taken against him, and has appealed to this court from the judgment so rendered against him as the result of such proceedings. As to appeals in such cases, see the case of *Worland v. State*, 82 Ind. 49.

The power of a court, possessing equity jurisdiction, to punish, as a contempt, the violation of an injunction or restraining order, lawfully granted by the court or a judge thereof at chambers or in vacation, is a power which has long been exercised and never seriously questioned. *Rapalje Contempts*, section 20. This power to punish for the violation of an injunction is incident to the power to grant an injunction, and may be exercised by any judge having jurisdiction of the cause in which an injunction was ordered. Redding, therefore, as special judge in the principal cause, had jurisdiction to hear and to determine the charge against Mowrer for his alleged violation of the restraining order herein above set forth. *Kerr Injunc.* 637; *Stimpson v. Putnam*, 41 Vt. 238.

To authorize the infliction of punishment for a violation of an order of injunction, the order must clearly embrace and prohibit the act complained of, and the act must have been in contravention of the spirit, as well as the letter, of the order. *Rapalje, supra*, section 43. An order of injunction prohibiting any disturbance of, or interference with, the *status*

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of property, pending litigation concerning it, does not prevent any party, having an interest in such property, from doing whatever is reasonably necessary for its preservation. *Behrens v. McKenzie*, 23 Iowa, 333. So, when subsequent events have so changed the general or immediate situation of property, for the maintenance of the *status* of which an order of injunction has been granted, as to render a literal compliance with the order impracticable, a reasonable conformity with the spirit of such order is all that can be insisted upon. *Robertson v. Bingley*, 1 McCord Ch. 193.

Strictly speaking, the writ of injunction does not restrain the plaintiff. By its terms, this writ ordinarily enjoins only the defendant. It does not follow, however, that the plaintiff can, with impunity, do acts which, at his instance, the defendant has been restrained from doing, and where the purpose of an injunction is to preserve the existing *status* of property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the plaintiff to disregard his own injunction, and to disturb the existing *status* of such property. The court granting the injunction has doubtless ample power to redress such an abuse, by ordering the plaintiff to restore the *status* which he has disturbed, and requiring him to abstain from further interfering improperly with such property; also, by dissolving the injunction upon the ground that the plaintiff has forfeited his claim to the equitable relief which the injunction afforded him, in the event that his misconduct has been so gross as to justify such a proceeding. *Vanzandt v. Argentine Mining Co.*, 2 McCrary U. S. 642.

There was nothing in the order in this case requiring the then existing *status* of the piano to be preserved, which restrained, or assumed to restrain, Hatch from emigrating from the State, but it was a violation of the spirit of the order for him to leave the State, and abandon all control over the piano, without either reporting his intention in that respect to the court and asking to be relieved from all further responsibility

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on account of his possession of the piano, or making suitable arrangements for its storage and safe-keeping at the house at which he left it. Under the circumstances, Harden was not required to assume any care of, or control over, the piano, nor even to accord house-room to it while he occupied Hatch's house. Consequently, the condition in which Hatch left the piano amounted, in a legal point of view, to a change of its previously existing *status*, and to a waiver of his right to insist upon a literal observance of the terms of the restraining order by others. In view of this changed *status* of the piano, Mowrer was guilty of no wrong in taking possession and control of the piano for safe-keeping pending the litigation concerning it. For a similar reason, no cause was shown which properly authorized the entry of the order requiring the piano to be returned to Hatch's house in Newcastle, and presumably to be placed under Harden's control without first appointing him a receiver to take charge of the property.

The judgment herein appealed from is reversed, and the cause remanded, with instructions to the court below to discharge the rule entered against Mowrer for his alleged contempt of the authority of the court.

Filed Oct. 6, 1886.

107	544
151	166
152	66

107	544
148	660
152	66

107	544
154	316
155	682

No. 12,608.

BEVER v. NORTH.

DEED.—Acknowledgment.—An acknowledgment is necessary to entitle a deed to go upon record, but is not essential to give it effect as between the parties.

REAL ESTATE.—Grantor and Grantee.—Covenant of Warranty.—Action by Third Person for Possession.—Notice to Grantor to Defend.—Where an action to recover possession of land is brought by one claiming to be the owner, and the grantor is notified of the action by his grantee, he will be bound by the judgment which results.

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SAME.—Eviction.—Appeal.—Where a judgment of eviction is rendered against the grantee, it is not his duty to appeal, but he may yield possession and sue upon the covenants in his deed.

SAME.—Wife's Interest an Estate, and not Mere Encumbrance.—In this State the wife's interest in the real estate of her husband is not an encumbrance, but an estate in the land itself.

SAME.—Operation of Deed can not be Defeated by Parol.—In an action against a grantor on the covenant of warranty, an answer that the plaintiff contracted for the land subject to the interest of the wife of a previous owner in one-third thereof, and that he agreed to assume and pay off the encumbrance created by her estate, is bad, as a grantor can not, by parol, defeat the operation of his deed.

PLEADING.—Opening Issues for Additional Pleadings.—Discretion of Trial Court.—The opening of the issues for the purpose of filing additional pleadings is to a great extent discretionary with the trial court, and an abuse of discretion must be shown to justify a reversal of the judgment.

From the Fountain Circuit Court.

J. McCabe and C. M. McCabe, for appellant.

T. F. Davidson, for appellee.

ELLIOTT, J.—The appellee's complaint counts on a deed containing full covenants of warranty, and charges that the covenants were broken by an entire failure of title as to part of the land.

There is no merit in the appellant's contention, that a deed is not valid unless acknowledged before some officer authorized to take acknowledgments. An acknowledgment is essential to entitle a deed to go upon record, but it is not essential to give effect to the deed as between the parties.

Where an action to recover possession of land is brought by one claiming to be the owner, and the grantee duly notifies his grantor of the action, the latter will be bound by the judgment in which the action results.

It is an ancient rule that if the grantor is called upon to defend he must successfully do so, or else the judgment will conclusively establish the fact that there was a breach of the covenants of the deed. *Morgan v. Muldoon*, 82 Ind. 347, and authorities cited.

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The complaint shows that an action was brought; that the appellant was duly notified to defend, and that a judgment of eviction was rendered, under which appellee yielded possession. There can be no doubt that the appellee was evicted, and that a clear right of action accrued to him for a breach of covenant. It was not the appellee's duty to appeal from the judgment of eviction, but he had a right to yield to it and sue upon the covenants in his deed. It is, indeed, not necessary for the complaint in an action for a breach of covenant to so fully plead the facts as does the one before us, for it is enough if a judgment and an eviction under it are shown without averring that the covenantor was required to defend. *McClure v. McClure*, 65 Ind. 482; *Wilber v. Buchanan*, 85 Ind. 42; *Wright v. Nipple*, 92 Ind. 310.

The allegations of the first paragraph of the answer are substantially these: That the appellant was the owner of the land described in the deed, subject to the rights of the wife of James Williams to one-third thereof; that the appellee knew of the interest of the wife of Williams; that he contracted for the land subject to her claim, and that he agreed to assume and pay off the encumbrance created by her estate. The court did right in adjudging this answer bad. A grantor can not contradict the terms of a deed by parol evidence, for the general rule is, that all preliminary negotiations are merged in the deed. *Phillbrook v. Emswiler*, 92 Ind. 590, and authorities cited; *Ice v. Ball*, 102 Ind. 42.

There is, it is true, an exception to this general rule, as well established as the rule itself, and that exception is, that parol evidence is admissible to prove the true consideration of a deed, except, perhaps, where the deed itself states the consideration fully and specifically. *Hays v. Peck*, *ante*, p. 389; *McDill v. Gunn*, 43 Ind. 315; *Carver v. Louthain*, 38 Ind. 530; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58. But the exception to the general rule does not permit the introduction of parol evidence to defeat the operation of the deed by rendering nugatory the words of convey-

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ance which it contains, and a grantor can not, under the guise of proving the consideration of a deed, prove that it was not to operate as a conveyance. To allow this to be done would be to render ineffective one of the most important parts of the deed; it would, in truth, be to permit the utter destruction of the deed as an instrument of conveyance. This the law will not allow. The principle which governs this case was thus stated by the court in *Beach v. Packard*, 10 Vt. 96: "Parol evidence can not be admitted to vary, contradict, add to or control a deed or written contract. The deed of bargain and sale, between these parties, had for its object the conveyance of certain land; and the extent of the land conveyed, the parties thereto, the estate conveyed thereby, and the covenants attending it, could not be affected by parol proof; and even that part, which relates to the consideration, or the payment thereof, could not be contradicted or varied, by parol, so as in any way to affect the purpose of the deed, that is, its operation as a conveyance."

It was said by the court in *Morse v. Shattuck*, 4 N. H. 229: "It is perfectly well settled that a consideration expressed in a deed can not be disproved, for the purpose of defeating the conveyance, unless it be on the ground of fraud."

This doctrine is sustained by many cases, among them *Grout v. Townsend*, 2 Denio, 336; *Belden v. Seymour*, 8 Conn. 304; *McCrea v. Purmort*, 16 Wend. 460, 473; *Hurns v. Soper*, 6 Harr. & J. 276. This principle is a very ancient one. 1 Sheppard Touchstone, 222. It would, indeed, be strange, if the grantor were permitted to aver that he did not convey what he assumed in express terms to convey, and the law gives no recognition to such a doctrine.

The estate of a wife under our statute is more than a right of dower, for it is paramount to the estate of one claiming through her husband, and sweeps entirely away all title of the purchaser to the one-third interest given her by the statute. The estate of the wife is not a mere encumbrance, but is an interest in the land which goes beneath the title acquired

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by a purchaser from her husband. *Mark v. Murphy*, 76 Ind. 534. When the rights of the wife prevail, the title of the purchaser from the husband disappears. If this title does disappear, then, of course, the purchaser had no title which he could convey, and he can not be permitted to aver, as against his grantee, that it was part of the consideration of the deed that the grantee should not acquire title to the land owned by the wife of a former owner unless he paid her for it. We can not regard the interest of the wife as an encumbrance, for it is an estate in the land itself. We can not regard the estate of the wife as a mere right of dower, for there is no reversionary interest in the party who claims through the husband. The title of the wife, when it vests, is absolute as against a grantee of the husband, so that it does not merely encumber the land, but tears up the title from the very roots. It is not like the lease of a life-estate, for there the reversion is in the lessor, and he succeeds to the fee upon the determination of the life-estate. Here the fee never vests in the grantee of the husband. We can not, therefore, regard as of controlling force the authorities which hold dower rights and life-estates to be mere encumbrances.

After the issues were closed, and on the day the cause was set down for trial, the appellant asked leave to file a cross complaint, but the court refused to grant it. We can not reverse the judgment on this ruling. The matter of permitting the opening of the issues for the purpose of filing additional pleadings is to a great extent a matter of discretion, and we can not interfere with its exercise. It is only where it is made to appear that there was an abuse of discretion, that we can reverse the judgment of the trial court, and there is nothing in the record, in the form of affidavits or otherwise, that shows any abuse of the discretionary powers of the trial court.

Judgment affirmed.

Filed Oct. 5, 1886.

The Western Union Telegraph Company v. Buskirk.

No. 12,610.

107	549
142	636
107	549
164	276

THE WESTERN UNION TELEGRAPH COMPANY v. BUSKIRK.

TELEGRAPH COMPANY.—*Statutory Penalty.—Complaint.—Matter of Defence.*—

A complaint against a telegraph company, to recover the statutory penalty for failing to transmit a message, need not aver that the person to whom the message was directed lived within one mile of the receiving station or within the town or city in which such station is situate, as this is matter of defence.

SAME.—*Receiving Message from Agent.—Authority to Sign Sender's Name.*—

Estoppel.—Where a telegraph company receives a message and the money for its transmission from a person other than the sender, without objection, it can not, in an action by the latter to recover the penalty for failure to transmit, question the authority of such person, to sign the sender's name.

INSTRUCTIONS TO JURY.—*Defective.—When Deemed Cured.*—Where an instruction states the law correctly, as far as it goes, but is incomplete, it may be completed by another which supplies the defect.

EVIDENCE.—*Order of Admission.—Discretion of Trial Court.—Practice.*—The order of admission of evidence is very much within the discretion of the trial court, and a clear abuse must be shown to justify a reversal of the judgment.

From the Orange Circuit Court.

J. H. Loudon and R. W. Miers, for appellant.

J. W. Buskirk, for appellee.

MITCHELL, J.—The appellee recovered a judgment against the appellant for \$100, the statutory penalty for an alleged failure to transmit a telegraphic message according to the provisions of section 4176, R. S. 1881.

The default charged was the neglect to transmit a message delivered to the appellant's agent at Orleans, Indiana, on the 5th day of November, 1884, by the appellee, and directed to John W. Buskirk, at Bloomington, Indiana.

The sufficiency of the complaint is questioned, because it omits to aver that John W. Buskirk resided within one mile of the telegraph station to which the message was directed, or within the city or town in which such station is situate. This precise point was presented and decided adversely to the appellant in *Western Union Tel. Co. v. Lindley*, 62 Ind. 371.

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Facts which go to excuse the failure to transmit a message delivered during usual office hours, according to the regulations of the company, must come from the defence. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176.

The evidence tended to show that the appellee made a memorandum of the message alleged to have been delivered for transmission, on a scrap of paper, and directed another, to whom he delivered the paper, with the money to pay the charge for transmission, to go to the appellant's office, transcribe the message upon one of the company's blanks and deliver it prepaid for transmission.

There was evidence tending to show that the person thus authorized went to the telegraph office, and upon one of the company's blanks, furnished him by its agent, wrote a telegram according to the memorandum given him, addressing it properly, to which he signed the appellee's name.

It is insisted that it does not appear that the person thus authorized had authority to affix the appellee's signature to the message, and that if he was authorized he must have signed it in the character of an agent.

The jury were justified in finding from the evidence, that the signature of the appellee was duly authorized.

The company's agent having received the message and the money for its transmission without objection, it is not in a position to raise any question with the appellee, either as to the authority of the person who signed his name, or concerning the manner or character in which it was signed. The message was properly directed, and sufficiently indicated on its face who the sender was. Having been received for transmission without objection, the other parties interested being content, it is not for the company now to question the authority of the person who signed it for the appellee. Thousands of messages are received for transmission by telegraph companies, which are communicated to them orally by the senders, and which the company's agents write out and sign by the implied authority of the sender. If they are so received, they

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are messages to be transmitted subject to all the liability imposed by law.

The question sharply contested at the trial was, whether or not the message and the money for its transmission were delivered at all or not. The appellee's messenger testified positively that he transcribed and delivered the message, signed the appellee's name to it, and paid the appellant's agent thirty-five cents for its transmission. The appellant's agent was equally emphatic in asserting that neither message nor money was delivered. To some extent both were corroborated. It therefore became a question eminently fit for the determination of the court and jury trying the cause. Having determined it, we can not, under the rule of this court, interfere with their conclusion.

The third instruction, given by the court, is the subject of criticism by the appellant. In this instruction the jury were told, in substance, that if the appellee delivered the message described in the complaint, to the defendant's agent, at the time and place therein mentioned, and paid the charges demanded for its transmission, and the defendant wrongfully failed and refused to transmit the message, etc., their verdict should be for the plaintiff.

Counsel challenge this instruction because, as they urge, the court undertook to recite the particular facts which would authorize the jury to find for the plaintiff, and in so doing omitted to state all the facts essential to a recovery. To have entitled the plaintiff to a verdict, it must have appeared that the defendant was engaged in telegraphing for the public, and that the message was delivered to it during usual office hours.

The jury were told that if certain facts were proved in respect to the delivery of the message, and the defendant wrongfully failed to transmit it, a recovery would be justified. No attempt was made in the instruction in question to define the circumstances under which a failure to transmit would have been wrongful. This was adequately done in other instructions. The question is therefore brought within the

Souders et al. v. Jeffries.

rule, often repeated, that where an instruction states the law correctly so far as it goes, but is incomplete, it may be completed by another which supplies the defect. *Binns v. State*, 66 Ind. 428; *Achey v. State*, 64 Ind. 56.

If the appellant was not, at the time the message was delivered to it for transmission, engaged in telegraphing for the public, or if the message was delivered at any other than usual office hours, the failure to transmit was not wrongful, and substantially to this effect the jury were instructed in other instructions given by the court. Taken together, the instructions fairly presented the law of the case.

The objections which are made to one instruction, covering the subject of the authority to sign the appellee's name to the message in question, have been sufficiently remarked upon by what has already been said.

The admission of testimony in corroboration of evidence given by the principal witness for plaintiff, as part of the latter's case in rebuttal, is complained of. The order in which evidence, otherwise competent, is admitted, is so much a matter within the discretion of the court trying the cause, that unless a clear case of abuse is presented, we should not feel justified in reversing a cause. The record before us does not present such a case.

We find no error. The judgment is affirmed, with costs.

Filed Oct. 6, 1886.

No. 12,609.

SODERS ET AL. v. JEFFRIES.

SHERIFF'S SALE.—Defective Description.—Statute of Limitations.—Where the purchaser at a sheriff's sale takes possession of the land actually sold, and he and his grantees remain in uninterrupted possession for ten years, the title so acquired can not be afterwards disturbed, even if the description was so defective as to make the sale void.

107 552
147 147

107 552
156 622
156 625
156 627

107 552
165 359

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SAME.—*Action for Possession.*—Where, however, the purchaser takes possession of land entirely different from that sold by the sheriff, the ten years' statute of limitations is not available to defeat an action by the owner for possession.

From the Monroe Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellants.

J. R. East and *W. H. East*, for appellee.

ELLIOTT, J.—The appellee instituted this action to quiet title to real estate, and issues were formed upon which a trial was had at the April term, 1883, resulting in a judgment in favor of the appellee. This judgment was reversed on appeal. *Souders v. Jeffries*, 98 Ind. 31. After the case reached the trial court under the mandate contained in the judgment of reversal, the appellee filed an additional answer to the cross complaint, to which the appellant unsuccessfully demurred.

The answer alleges that a mortgage was executed by the appellant and her husband; that it was on the land mentioned in the cross complaint; that it was described as out-lot number twelve, in the town of Bloomington; that a decree of foreclosure was rendered, the land sold, and purchased by the grantors of the appellee, on the 31st day of January, 1874; that they entered into possession immediately after the sale and remained in uninterrupted possession until the conveyance to the appellee who has since been in possession, and that no action was brought within ten years from the date of the sale to recover possession or avoid the sale.

We have no brief from the appellee, and we do not know upon what theory the answer was constructed. It is, however, said by appellants' counsel, that the theory of the appellee was that there was a mutual mistake, and if this is the theory upon which the answer proceeds it is clearly bad. It is not enough to show a mistake, for it must also be shown that the mistake was mutual, and that it was one of fact. *Mason v. Mason*, 102 Ind. 38; *Hylar v. Humble*, 100 Ind. 38; *Armstrong v. Short*, 95 Ind. 326. We do not, however, regard the answer as framed upon the theory that there was

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a mutual mistake of fact; on the contrary, we think that the defence attempted by the answer is that of the ten years' statute of limitations.

The averments of the answer are, that the defendants "executed the mortgage on the land described in the cross complaint;" that the "said real estate was sold," and that the appellee's grantors entered into possession of it under the sheriff's deed. These averments the demurrer admits to be true, and, if true, they are certainly sufficient to enable the appellee to make the defence of the statute of limitations. If the land was mortgaged and was sold, then, although there might be the gravest irregularities in the proceedings, no action could be maintained after the expiration of ten years. It is true that the answer alleges that the "defendants executed a mortgage on the land described in the cross complaint by the description of out-lot number twelve, in the town of Bloomington," while the description in the cross complaint is "Seminary lot 12, in Bloomington." There is, unquestionably, a defective description; but, if the land of which the appellee took possession was actually sold, and was held by him and his grantors for ten years without any interruption of possession, then the title of the appellee can not be disturbed, even if the description was so defective as to make the sale void. *Second Nat'l Bank v. Corey*, 94 Ind. 457; *Wright v. Wright*, 97 Ind. 444, see p. 447.

The statute protecting purchasers at sheriff's sales was not intended to cure mere irregularities,—for mere irregularities will not vitiate a sheriff's sale,—but to prevent the disturbance of titles founded upon a sheriff's sale made under color of authority, although the sale was utterly invalid. Valid sales, of course, need no statute of repose to protect them; it is only the invalid ones that need this protection. The cases of *Angle v. Speer*, 66 Ind. 488, *Vannoy v. State*, 64 Ind. 447, and cases of a kindred character, are not in point, for the question is, not whether a sheriff's deed may be reformed because of a mistake in the mortgage on which the

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judgment was rendered, but whether a defective, erroneous or insufficient description will prevent the purchaser at a sheriff's sale from successfully pleading the ten years' statute of limitations? Construing the answer as we have done, we have no doubt of its sufficiency.

The question presented by the evidence is very different from that presented on the pleadings. As we understand the evidence, it shows that the sheriff conveyed to the appellee an entirely different lot from that claimed in his answer and awarded him by the judgment of the court. It was shown that Seminary lot number twelve was in a different township from out-lot number twelve, and there was no evidence showing that it was the former lot which was really sold, or of which the appellee and his grantors took possession, under the sheriff's deed. The evidence is essentially the same as it was on the former appeal, and the decision there rendered governs the case in all its stages. The question is, not whether the appellee might have made a different case by the evidence, but whether he has in fact done so? We need not and do not determine what additional evidence is necessary to take the case out of the operation of the former decision.

The trial court is instructed to grant a new trial.

Judgment reversed.

Filed Sept. 24, 1886.

No. 13,155.

FAWKNER ET AL. v. THE SCOTTISH AMERICAN MORTGAGE
COMPANY ET AL.

HUSBAND AND WIFE.—*Tenants by Entireties.*—*Mortgage.*—*When Binding Upon Wife.*—A mortgage executed by a husband and wife, both being principals therein, upon land owned by them as tenants by entireties, as security for a loan of money which is used to pay off valid liens existing on the mortgaged premises, is binding upon both mortgagors.

Fawkner *et al.* v. The Scottish American Mortgage Company *et al.*

SAME.—Contract of Wife.—Personal Judgment.—Any contract which a married woman may lawfully execute, may be enforced against her by the personal judgment of a court of competent jurisdiction.

From the Marion Superior Court.

C. S. Denny and *W. F. Elliott*, for appellants.

J. M. Judah and *O. B. Jameson*, for appellees.

Howk, C. J.—By proper assignments of error here, the appellants have brought before this court the only errors assigned by them respectively in general term of the court below, namely, that the court at special term had erred in its conclusions of law upon its special finding of facts.

The facts of this case were found by the court at special term to be substantially as follows:

1. On the 27th day of October, 1881, the defendants John E. and Sallie A. Fawkner were, and for more than ten years prior thereto had been, and still were husband and wife; that on that day, and since January 6th, 1880, Sallie A. Fawkner was the owner, in fee simple, of the east half of the southeast quarter of section 8, township 14 north, of range 3 east, in Marion county, Indiana, described in plaintiff's mortgage in suit in this case; that Sallie A. Fawkner and her husband, John E. Fawkner, were, and had been since July 14th, 1876, the owners as tenants by entireties of the residue of the lands described in plaintiff's mortgage, to wit: The west half of the southeast quarter, also the southwest quarter, and all that part of the northwest quarter which lies south of White river, all in said section 8, township 14 north, of range 3 east; also, that part of section 7, in said township and range, which lies east of White river, in Marion county, Indiana.

2. On the 27th day of October, 1881, all of the above described lands, excepting forty-four acres, more or less, in the northwest quarter of said section 8, described as all of the northwest quarter of said section 8, south of White river, except twelve acres described as beginning at the southwest corner of said northwest quarter, and running thence to a

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point, so that a line drawn thence north to White river, and thence with the meanderings of said river to the line dividing said sections 7 and 8, and thence south to the beginning, would contain twelve acres, were encumbered by two mortgages or trust deeds to Jonathan Edwards, trustee for the Equitable Trust Company of New London, Connecticut, executed on November 21st, 1876, by John E. Fawkner and Sallie A. Fawkner, his wife, and recorded in the records of the recorder's office of Marion county, and given to secure the payment of certain bonds therein described of John E. Fawkner, in the aggregate sum of \$6,000, with nine per cent. interest, all due November 1st, 1881, and amounting at that date with interest to the sum of \$6,553.50.

3. At the time of the execution of said mortgages or trust deeds to Jonathan Edwards, trustee, said John E. and Sallie A. Fawkner, husband and wife, held all the lands thereby mortgaged as tenants by entireties, and the \$6,000 were borrowed by and for the sole use of John E. Fawkner, his wife Sallie A. joining with him in the execution of the mortgages or trust deeds to secure the payment of the same as aforesaid; and at and before the maturity of such mortgages or trust deeds, on November 1st, 1881, there were taxes due and delinquent on said lands, amounting to the sum of \$37.14, and a judgment for costs in the sum of \$6.70, rendered by the superior court of Marion county, on July, 18th, 1879, in favor of Thomas McIntyre and others and against John E. and Sallie A. Fawkner.

4. On and prior to October 15th, 1881, one Francis Smith of Indianapolis, in Marion county, was a broker engaged in the business of procuring and negotiating mortgage loans; and, on that day, John E. Fawkner, for himself and his wife, Sallie A. Fawkner, made a written application, entitled, "Memoranda of information," to said Smith to procure for them a loan of \$7,000 to be secured by a mortgage upon said premises, and signed the same "John E. Fawkner," and "Sallie A. Fawkner, by J. E. Fawkner." In this writing,

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among other things, is the following: "State the purpose for which the money is wanted? Paying off mortgages and stocking farm." At the same time, John E. Fawkner, for himself and his wife, Sallie A. Fawkner, executed in the same manner a certain agreement, employing said Smith as their agent or broker to negotiate for them a mortgage loan on said premises for the sum of \$7,000, and agreeing to pay him five per cent. upon the gross amount of the loan procured, for his services, and authorizing him out of the proceeds of such loan to pay off any existing liens on said premises that might appear upon the abstract of title.

5. Of the making of said application and the signing of said papers, on October 15th, 1881, by John E. Fawkner, her husband, Sallie A. Fawkner knew nothing whatever until the 27th day of October, 1881; and said application and agreement contained the personal pronoun, "I," at all places where the party making the application and executing the agreement was referred to; and John E. Fawkner never said anything to his wife, Sallie A. Fawkner, about applying for such loan or signing said papers, until the day the mortgage was executed, on October 27th, 1881; whereas the application and agreement were made and signed on the 15th day of October, 1881, by said John E. Fawkner, who had no authority from Sallie A. Fawkner at the time to sign said papers for her.

6. Afterwards, on October 27th, 1881, John E. and Sallie A. Fawkner went together to the office of said Francis Smith, in Indianapolis, where each of them signed and made oath to a third written and printed instrument, applying to said Smith as a broker to procure for them a mortgage loan of \$7,000 on said premises, and agreeing, among other things, that whatever commission should be paid to said Smith, should be considered solely as his compensation for procuring such loan, and declaring that the "Memoranda of information," furnished to Smith on October 15th, 1881, and signed as aforesaid by John E. Fawkner for himself and

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Sallie A. Fawkner, was true and correct, and made as an inducement for said Smith to procure the said loan.

7. After John E. and Sallie A. Fawkner had signed and were sworn to such instrument, they each signed the mortgage sued upon, and acknowledged its execution before a notary public of Marion county; and they each at the time executed the notes, described in and secured by such mortgage, and sued upon in this action. Sallie A. Fawkner executed such mortgage and each and all of such notes jointly with her husband, John E. Fawkner, as a principal with him and not as his surety, to obtain the loan of money to pay off and discharge the said mortgages and trust deeds to Jonathan Edwards, trustee, and the said tax and judgment liens upon the said premises, and to pay the cost of procuring such loan, and for their joint benefit. All of the said papers were carefully read over to Sallie A. Fawkner and explained to her, before they were signed by her, and she fully understood the contents and provisions of the papers, notes and mortgage, so executed by her, and she assented thereto, as did her husband John E. Fawkner; and the said mortgage and the notes secured thereby were, by John E. and Sallie A. Fawkner, delivered over to and left with said Francis Smith, to be by him, for them, negotiated with the plaintiff, the Scottish American Mortgage Company, to obtain such money for the said purposes.

8. By the express terms of such mortgage, John E. and Sallie A. Fawkner, the mortgagors therein, declared that the money borrowed and the debt secured thereby were for the payment of a debt secured by mortgages on said real estate, recorded on certain pages of certain books of the records of the recorder's office of Marion county, amounting to \$6,553.50, for the taxes on the lands, and for the expenses of negotiating such loan.

9. After the execution of such mortgage and notes by John E. and Sallie A. Fawkner, and the delivery thereof by them to said Francis Smith, for the purpose aforesaid, the

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said Smith, on the 31st day of October, 1881, presented the same to the agent of the plaintiff, who accepted such mortgage and notes and paid thereon to Smith, for such mortgagors, the full sum of \$7,000, and on the same day such mortgage was duly recorded in the recorder's office of Marion county.

10. Said Francis Smith, out of such sum of money, paid off and satisfied the two mortgages or trust deeds to Jonathan Edwards, trustee, and the tax and judgment liens on the mortgaged premises, and retained the sum of \$350 as his commission for securing the loan, and he paid the sum of \$15 for a policy of fire insurance on the buildings on such mortgaged premises in compliance with a stipulation in the mortgage providing for such insurance; and the balance of such loan, to wit, the sum of \$37.66, he paid to John E. Fawkner, who retained and used the same. All of such applications and payments of money were made by said Smith, by the authority and with the consent of John E. and Sallie A. Fawkner.

11. There was due the plaintiff upon the notes and mortgage sued upon, of principal and interest and for attorneys' fees, the aggregate sum of \$8,510.72, which was payable without any relief from valuation laws.

A number of other facts were specially found by the court, which are not material to the only questions presented and discussed by appellants' counsel, in their brief of this cause, and therefore we need not give even the substance of such other facts in this opinion.

Upon the foregoing facts the court stated, among others, the following conclusions of law:

"1. The said John E. Fawkner and Sallie A. Fawkner are both liable to the plaintiff herein upon the said mortgage and upon the said notes secured thereby; and the said amount, found due and unpaid thereon, is a lien upon and secured by all of the said mortgaged premises.

"2. The plaintiff is entitled to recover of and from the

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defendants, John E. Fawkner and Sallie A. Fawkner, the said sum of \$8,510.72, found by the court to be due upon the said mortgage and notes and unpaid, without any relief whatever from valuation or appraisal laws, together with the costs of this suit."

It is claimed by appellants' counsel, as we understand their argument, that the trial court erred in these conclusions of law, upon two grounds, namely:

1. Because appellant Sallie A. Fawkner executed the notes and mortgage sued upon, as to a part of the loan secured thereby, as the surety of her husband, John E. Fawkner; and,

2. Because a personal judgment could not be rendered against appellant Sallie A. Fawkner, a married woman, in this case.

In the consideration of the questions presented by appellants' counsel, it must be borne in mind that the cause comes before us solely upon the alleged error of the trial court in its conclusions of law. In such a case, as we have often decided, the appellants admit that the facts have been fully and correctly found by the court, and can only claim here, under such assignment of error, that the trial court had erred in its application of the law to the facts so found. *Schindler v. Westover*, 99 Ind. 395; *Helms v. Wagner*, 102 Ind. 385; *Burdge v. Bolin*, 106 Ind. 175.

It was found by the court, as a fact, that appellant Sallie A. Fawkner executed the mortgage and notes sued upon, jointly with her husband, John E. Fawkner, as a co-principal with him, and *not* as his surety. In the face of this fact, admitted by appellants to have been correctly found as the case is presented here, it will hardly do to say that Sallie A. Fawkner executed such mortgage and notes as the surety of her husband, John E. Fawkner. The entire facts, leading to the execution of the mortgage and notes, were fully found by the trial court, and it clearly appears therefrom that

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Sallie A. Fawkner, throughout the whole negotiation, acted as a principal in a business transaction, which closely affected her personal rights and estate, and in which she had a clear right to act for herself under our law. The disbursements of the money realized from the negotiation of the loan, to secure which the mortgage and notes were given, were also fully found by the court; and these disbursements clearly show that such money was properly applied, by the authority and with the consent of Sallie A. Fawkner, to the extinguishment and satisfaction of valid liens upon her property and estate, and to the payment of debts which she had lawfully contracted. Upon the facts found by the court and the law applicable thereto, as settled by our decisions, we are of opinion that the mortgage and notes sued upon were the valid and binding contracts as well of the appellant Sallie A. Fawkner, as of her husband, John E. Fawkner, and that the court did not err in its conclusions of law. *Dodge v. Kinzy*, 101 Ind. 102; *Vogel v. Leichner*, 102 Ind. 55; *Brown v. Will*, 103 Ind. 71; *Cupp v. Campbell*, 103 Ind. 213; *Engler v. Acker*, 106 Ind. 223; *McLead v. Aetna Life Ins. Co.*, ante, p. 394.

But it is said that the trial court erred in rendering a personal judgment against the appellant Sallie A. Fawkner, because she was a married woman. We have shown, we think, that the mortgage and notes sued upon, in this case, were the legal, valid and binding contracts of Sallie A. Fawkner, notwithstanding her coverture. Any contract which a married woman may lawfully execute, may be lawfully enforced against her by the personal judgment of a court of competent jurisdiction.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

ELLIOTT, J., took no part in the decision of this cause.

Filed Oct. 7, 1886.

Keeling v. The State.

No. 13,280.

KEELING v. THE STATE.

107	563
186	15
107	563
141	112

CRIMINAL LAW.—Assault and Battery with Intent to Murder.—Indictment.—

An indictment which charges, in substance, that the defendant unlawfully and feloniously, and in a rude, insolent and angry manner, with premeditated malice and with intent to kill and murder, shot a named person, is good as charging an assault and battery with such intent.

SAME.—Conviction of One Offence Under Indictment for Another.—A person charged with an assault and battery with intent to murder, may be convicted of an assault with intent to murder, if the evidence makes such a case.

SAME.—Conviction of Wrong Offence.—Harmless Error.—Where the evidence makes a case of mere assault with intent, but the court finds the defendant guilty of an assault and battery with intent, as charged in the indictment, it is an error, but a harmless one, as the punishment for both offences is the same.

From the Marion Criminal Court.

C. M. Cooper and *G. W. Hunter*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ZOLLARS, J.—It is charged in the indictment, that appellant "did, in a rude, insolent and angry manner, unlawfully and feloniously, touch, strike, shoot and wound one William F. Kennedy," and discharged and fired off a loaded revolver at and against the person of said Kennedy, "with the intent then and there, and thereby, him, the said William F. Kennedy, feloniously, unlawfully, purposely and with premeditated malice, to kill and murder."

After conviction, and the overruling of his motion for a new trial, appellant moved for an arrest of judgment, because of the insufficiency of the indictment. It was held in the case of *Howard v. State*, 67 Ind. 401, cited by appellant's counsel, that in order that an indictment may be sufficient as a charge of an assault with intent to murder, there must be an averment of the present ability of the accused to commit the injury. That holding is of no avail to appellant in this case, because, here, the charge is an assault and battery with

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intent to murder. It was further held in that case, that an indictment for an assault and battery with intent to murder, in order to be good, must charge that the touching was unlawful, and in either a rude, insolent, or angry manner. In that regard, the indictment before us fully meets all of the requirements of the holding in that case, and in the cases of *Hays v. State*, 77 Ind. 450, and *Knight v. State*, 84 Ind. 73, also cited by appellant's counsel.

Taking the indictment as a whole, it charges that appellant unlawfully and feloniously, and in a rude, insolent and angry manner, with premeditated malice and with intent to kill and murder, shot Kennedy.

That the indictment is good as a charge of an assault and battery with intent to kill and murder, we think, is beyond question. We do not, therefore, extend this opinion for further elaboration or the citation of authorities. The court below did not err in overruling the motion to arrest the judgment.

There was no evidence of any battery. Appellant shot at but missed Kennedy. If, therefore, the conviction may be upheld, it must be upon the ground that appellant was, and is, guilty of an assault with intent to kill and murder Kennedy. Under our statutes, a person charged with an assault and battery with intent to murder, may be convicted of an assault with intent to murder, if the evidence makes such a case. *Dickinson v. State*, 70 Ind. 247; *Siebert v. State*, 95 Ind. 471; *State v. Fisher*, 103 Ind. 530; *Powers v. State*, 87 Ind. 144.

The court below found that appellant was guilty of an assault and battery with intent, etc., as charged in the indictment, but that error in the finding is not such an error as to work any injury to appellant, if he was in fact guilty of an assault with intent, etc., because the punishment in either case is the same. R. S. 1881, section 1909; *Siebert v. State*, *supra*.

It is insisted further, that the finding and judgment are not supported by the evidence, because appellant was acting in

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self-defence. There is nothing to show that he was so acting. In the first place, he was the aggressor, and provoked whatever demonstrations towards violence there were on the part of Kennedy. See *Barnett v. State*, 100 Ind. 171. And in the second place, when the shot was fired, there was no such danger as would justify the shooting.

We have read the evidence carefully, and after having so read it, we can not say that it does not tend to show that appellant fired the shot with the malicious and felonious intent of killing Kennedy. The record presents no error that would justify this court in reversing the judgment.

Judgment affirmed, with costs.

Filed Oct. 7, 1886.

No. 12,568.

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107	565
151	182

WITNESS.—Heirs.—Declarations of Ancestor.—Conveyance.—Gift.—Advancement.—Presumption.—In a suit for the partition of real estate of which the ancestor died seized, an heir, who is a party to the suit, is not a competent witness to prove declarations of the ancestor at the time of making certain conveyances to his children, in order to show that the conveyances were gifts, and not advancements as the law presumes. Section 499, R. S. 1881.

NEW TRIAL.—Motion.—Must be Sufficient as to all who Unite.—If a motion for a new trial is not well made as to all who unite in it, there is no error in overruling it.

From the Knox Circuit Court.

W. H. De Wolf and *S. N. Chambers*, for appellants.

G. G. Reily and *W. C. Niblack*, for appellees.

ELLIOTT, J.—This suit was brought by the appellees against the appellants for the partition of land owned at the time of his death by John Wolfe, deceased.

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A material question in the case was whether lands conveyed to the appellants were conveyed as gifts or were advancements from their father, John Wolfe, and to prove that they were gifts some of the defendants, here the appellants, were introduced as witnesses, and an offer was made to prove by them what was said by their father at the time the conveyances were made. The trial court did not err in ruling that the defendants were not competent to prove the declarations of their deceased father. Where the controversy is between heirs as to rights derived through contracts or transactions with the ancestor, none of the parties are competent to testify as to declarations made by him. The case falls fully within the spirit of section 499 of the statutes. *Wiseman v. Wiseman*, 73 Ind. 112 (38 Am. R. 115), and cases cited; *Cottrell v. Cottrell*, 81 Ind. 87; *Cupp v. Ayers*, 89 Ind. 60; *Cuthrell v. Cuthrell*, 101 Ind. 375; *Lamb v. Lamb*, 105 Ind. 456, see p. 459.

A conveyance or transfer of property by a parent to a child is *prima facie* an advancement, and not a gift; it may, however, be shown, by competent witnesses, that the conveyance or transfer was intended as a gift. *Dillman v. Cox*, 23 Ind. 440; *Duling v. Johnson*, 32 Ind. 155; *Stokesberry v. Reynolds*, 57 Ind. 425; *Dille v. Webb*, 61 Ind. 85. But for the purpose of proving the declarations of the deceased father, in order to defeat the presumption of law that the conveyance or transfer was an advancement, the children who seek to overthrow the presumption are not competent witnesses in an action in which they are parties.

The parties joined in a motion for a new trial, and even if we should regard the rulings of the trial court as erroneous as against some of the appellants, we could not reverse, for, if a motion for a new trial is not well made as to all who unite in it, there is no error in overruling it. *Boyd v. Anderson*, 102 Ind. 217; *Feeney v. Mazelin*, 87 Ind. 226; *First Nat'l Bank v. Colter*, 61 Ind. 153; *Estep v. Burke*, 19 Ind. 87; *Teter v. Hinders*, 19 Ind. 93. We can, therefore, do no

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more than ascertain whether all of the defendants who join in the motion are entitled to a new trial, and, finding that they are not, we must affirm the judgment even though as to some of them there were erroneous rulings.

Judgment affirmed.

Filed Oct. 7, 1886.

No. 13,122.

MERGENTHEIM v. THE STATE.

CRIMINAL LAW.—Indictment.—Return.—Trial.—Where it affirmatively appears that the indictment set out in the transcript was duly returned into court, and that the defendant appeared and pleaded thereto, it is sufficiently shown that the trial was had upon such indictment, and the fact that the indictment and cause bear different numbers is immaterial.

SAME.—Public Nuisance.—Indictment.—Duplicity.—Where the doing of any one of a number of distinct acts is made an offence to which the same punishment is affixed, as in section 2066, R. S. 1881, relating to public nuisances, the doing of any one or more of such acts by the same person, at the same time, constitutes but a single offence, which may be charged in the same count of indictment without duplicity.

SAME.—Negating Exception in Statute.—An indictment founded on section 2066, for creating a nuisance, need not negative the exception contained in the proviso to such section.

SAME.—Description of Locality and Business.—Where the acts mentioned in the indictment are unlawfully done and are injurious to the property and health of others, they constitute an indictable offence, without regard to the business in which the defendants are engaged, and a description of the locality and business is not essential to the validity of the indictment.

SAME.—Evidence.—Feeling Between Witness and Defendant.—Where a witness for the prosecution has testified concerning the state of feeling existing between himself and the defendant, evidence as to his feeling toward those of the defendant's race who reside in the community, may properly be excluded.

SAME.—Physical Condition of Thing or Locality.—Comparison.—Where the physical condition of a thing or locality is in question, at the time a certain event happened, it is sometimes competent to show such condi-

107	567
124	19
124	170
124	383
107	567
130	27
130	68
107	567
133	407
107	567
135	576
107	567
144	249
107	567
148	222
151	249
107	567
155	696
107	567
171	58

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tion at other times shortly before or after the event, and that it was in the same condition when the event occurred, but this rule does not apply, in a prosecution for maintaining a nuisance, to a comparison of odors arising therefrom covering a period of several years.

SAME.—Neglect or Act of City will not Excuse Creation of Nuisance by Citizen.—One who is prosecuted for discharging refuse substances from his mills into a canal bed, and thereby creating a nuisance, is not excused by the fact that the city in which his mills are situate had failed to provide suitable drainage, or had previously obstructed the flow of water in the canal.

SAME.—Knowledge.—Presumption.—Where it is shown that the owner of the mills lived in the vicinity, and that the alleged nuisance had existed for two years, it will be presumed, in the absence of any showing to the contrary, that he had such knowledge as made him responsible therefor.

SAME.—Number of Witnesses.—Limit.—Discretion.—It is within the discretion of the trial court to fix a reasonable limit to the number of witnesses on a given subject.

SAME.—New Trial.—Misconduct of Juror.—Where misconduct of jurors is alleged as a cause for a new trial, the misconduct must be shown, and not left to inference.

SAME.—Immaterial Variance.—A variance in a matter of unnecessary description will not authorize a reversal.

From the Miami Circuit Court.

R. P. Effinger and *R. J. Loveland*, for appellant.

F. T. Hord, Attorney General, *C. R. Pence*, Prosecuting Attorney, and *S. D. Carpenter*, for the State.

MITCHELL, J.—At the June term, 1884, of the Miami Circuit Court, the grand jury of Miami county presented that Moses Oppenheimer, Harry W. Strause and Lewis Mergentheim did, near the dwelling-houses of divers citizens, whose names are set out, unlawfully cause, procure, and permit large quantities of filth, dirty and impure water, suds, and other offensive substances, to be collected, and to remain near said dwelling-houses, by reason whereof divers offensive and unwholesome stenches and smells were emitted therefrom, so that the air was filled and impregnated with noisome smells and thereby rendered unwholesome to the citizens of said county.

Before the trial commenced the death of Oppenheimer was

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suggested upon the record; Strause was acquitted; whilst Mergentheim was found guilty, and a fine of twenty dollars assessed against him.

The first point made against the regularity of the proceedings is, that it is not shown by the record that the trial was had upon the indictment returned by the grand jury. This point is without merit. The record recites that an indictment, a copy of which is set out, was properly returned by a grand jury duly empanelled, the indictment being numbered 983. The subsequent proceedings, as the record shows, were had in cause numbered 460. They follow in regular order, and are shown to be proceedings on the indictment. That the number on the indictment and the number of the cause were different, is immaterial. It affirmatively appears that the indictment, set out in the transcript, was returned into court, and that the appellant appeared and pleaded to the indictment returned. The case is fully covered at this point by what was said in *Wall v. State*, 23 Ind. 150. See, also, *Mathis v. State*, 94 Ind. 562; *Heath v. State*, 101 Ind. 512; *Epps v. State*, 102 Ind. 539; *Padgett v. State*, 103 Ind. 550; *Henning v. State*, 106 Ind. 386.

The indictment is predicated upon section 2066, R. S. 1881. By this section the doing of any one of a number of distinct and separate acts is made a crime to which precisely the same punishment is affixed. In such a case, the doing of any one or more of the prohibited acts by the same person, at the same time, constitutes but a single offence, which may be charged in the same count of an indictment without rendering it subject to the infirmity of duplicity. *Davis v. State*, 100 Ind. 154; *Fahnestock v. State*, 102 Ind. 156.

The section referred to prescribes, among other things, that "Whoever * * * causes or suffers any offal, filth, or noisome substance to be collected or to remain in any place, to the damage or prejudice of others or the public," shall be subject, upon conviction, to certain penalties. The indictment charges the violation of this part of the section alone, but if it had com-

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bined conjunctively any or all of the other prohibited acts, and had charged that all such acts were done at the same time by the same persons, the objection that it was bad for duplicity, would not have been well made. The distinction between the case before us, and *Knopf v. State*, 84 Ind. 316, is apparent. In the case cited, a single count in the indictment charged offences prescribed in three separate sections of the statute, to each of which a different punishment was annexed.

It is said further that the indictment was bad, because it did not negative the exception contained in the proviso found in section 2066, which authorizes towns and cities to enact and enforce ordinances for the protection of the public health.

It is difficult to perceive how the acts charged could have been done in pursuance of any ordinance for the promotion of public health. At all events, if the defendants were acting under the power conferred by an ordinance, that was a proper matter to be shown in defence. *State v. Maddox*, 74 Ind. 105.

The indictment under examination charged that the defendants unlawfully caused, procured, permitted and suffered large quantities of filth, etc., to be collected and to remain, etc. It was not necessary, as the appellant contends, to describe with more particularity the means by which this was done. If the acts mentioned were unlawfully done, and were injurious to the property and health of others as charged, they constituted an indictable offence, irrespective of the business in which the defendants may have been engaged. Conceding that the business in which the defendants were engaged, and the locality and surroundings of the establishment in which it was conducted, were important elements in determining whether or not such business was so carried on as to constitute an offence, a description of the locality and business was not essential to the validity of the indictment.

A special answer was filed, to which a demurrer was sus-

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tained. While this ruling is assigned for error, nothing further is said concerning it, than that the facts stated in the plea or answer are incompatible with guilt on the part of the defendants. We are unable to perceive that any error was committed in sustaining the demurrer. The facts pleaded constituted no defence.

Gottlieb Conradt testified on behalf of the State. On cross-examination he was asked the following question: "Is'nt it a fact that you are indignant at the Jews in the city of Peru." Having previously been required to answer, as to the state of feeling existing between himself and the defendants, the court sustained an objection to the foregoing and other similar questions. In this there was no error. While it is not irrelevant to inquire of a witness, who has testified against a party, whether or not he entertains or has expressed feelings of hostility toward the party concerned, the record discloses that the rights of the appellant suffered no abridgment in that respect.

The indictment was returned in June, 1884. The defendants at the trial offered to prove that subsequent to that date, in 1885, no offensive odors were emitted from the canal into which the water from their woollen mills was discharged, and which, becoming stagnant, caused the odors complained of. They proposed in the same connection to prove that the odors emanating therefrom, from 1882 to 1885, were of the same character during the whole intervening period. This testimony was excluded. In this no error was committed.

Where the physical condition of a thing or locality is in question, at the time a certain event happened, it may be competent under some circumstances to show the condition of the thing or locality at other times shortly before or after the event, and that it was in the same condition when the event in question took place, but we think it would be carrying this rule too far to apply it to a comparison of odors covering a period of several years.

The defendants proposed to ask a witness the following

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question: "What is the main business of the Peru Woollen Mills?"

The court sustained an objection to the question. It insisted that this was error. As it does not appear by any statement in the record what the witness would have testified to in answer to the question, the point as made presents nothing for decision.

Another witness, who testified to the offensiveness of the matter discharged into the canal, was asked whether the canal would not have been as offensive without the refuse from the woollen mills as with it? The exclusion of an answer to this question was manifestly proper. It simply invited the opinion of the witness upon the matter in issue.

The testimony as to the health of the operatives in the mills or dye rooms was also properly excluded. It was immaterial even if those in the mills suffered no inconvenience, provided the defendants allowed substances to be discharged from their mills into the canal, two hundred or three hundred feet distant, which were permitted to remain, to the discomfiture of those in the near vicinity. Equally immaterial was the testimony proposed by another witness, by whom the defendants sought to show that others in the vicinity maintained bad-smelling substances on their premises.

The court limited the parties to the examination of seven witnesses on each side, in respect to the subject of the condition of the canal, and the odors emitted therefrom. A reasonable limitation is within the discretion of the court. We can not say, since the defendants were notified of the limitation beforehand, that there was any abuse of discretion in this case. *Butler v. State*, 97 Ind. 378; *Union R. R., etc., Co. v. Moore*, 80 Ind. 458.

While it is true, the court did not in terms announce that the defendants would be limited, a limit was established and announced by the court as against the State at seven, the defendants having moved to establish the State's limit at three witnesses. Having established a limit against the State, the

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defendants were bound to infer that a like limit would be applied to them.

It was no excuse for the defendants, assuming that they discharged substances from their mills in such manner as to create a nuisance, that the city of Peru, within which their mills were situate, failed to provide suitable drainage, or that the city had some years before, obstructed the flow of the water in the canal. If the city interfered with, or appropriated any rights which the defendants had to flow their refuse into or through the canal, their remedy was against it. Such interference, if it took place, gave them no right to use their mills in such manner as to create a nuisance, and injure the health and property of others.

One of the grounds for a new trial is based upon the affidavit of one Griggs, in which he deposes that two of the jurors, who took supper at his house during the progress of the trial, read a newspaper in which there was an article making allusion to the trial and its importance. It does not appear that the article alluded to was seen or read by the jurors, and, presuming against misconduct until the contrary appears, we must assume that if the jurors saw the article alluded to they refrained from reading it. Besides, it does not appear that the alleged misconduct was not known to the defendants before the jury retired to consider of their verdict. *Henning v. State, supra.*

Some mild criticism is made in respect to one of the instructions, but we see nothing in it which was irrelevant to the case, nor does it state the law inaccurately.

An examination of the record discloses that there was evidence reasonably tending to sustain the verdict. It is said the proof does not show that the appellant had knowledge of the fact that the mills were so managed as to create a nuisance. This was peculiarly a matter of defence. He was proved to be one of the proprietors of the mills. He lived in the vicinity. There was evidence tending to prove that the condition of things complained of existed for two years

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and more. In this state of the case, the appellant having offered no explanation, it must be presumed he had such knowledge as made him responsible for the actual conditions produced by his own property. *Grader v. State*, 105 Ind. 271.

It is said lastly, that there is a variance between the proof and the charge as laid in the indictment, in this, the crime is laid as having been committed "at and near the dwelling-houses of Eli Betzner, Theodore Conradt, Henry J. Miller, Joseph Reyburn, and divers other citizens," while the proof shows that the offensive matter was located near the residences of Eli Betzner, Theodore Conradt, Joseph Reyburn, "and a man by the name of Miller." The proof with reference to the Miller residence was to the effect, that Mrs. Miller lived there and "a man by the name of Miller." Mrs. Miller testified that her son Henry was a member of her family, and was sickened on account of the odors complained of. Upon this testimony it may have been inferred by the jury that the son, Henry Miller, was the person whose dwelling-house was affected by the acts complained of. The failure to prove the initial letter of the middle name is not a variance. *Choen v. State*, 52 Ind. 347 (21 Am. R. 179). The proof at this point is not entirely satisfactory. But the variance, if such it be, had reference only to a matter of unnecessary description; and for a mere failure to prove with technical exactness an averment which was not necessary nor of the essence of the offence charged, we would not, under the rules governing appeals in criminal cases, be authorized to reverse.

The judgment is affirmed, with costs.

Filed Oct. 7, 1886.

Bumb v. Gard *et al.*

No. 12,687.

BUMB v. GARD ET AL.

DECEDENTS' ESTATES.—Widow's Interest.—Sale of Whole Estate to Pay Husband's Debts.—When Binding on Heirs.—While the widow's interest can not be sold to pay the debts of her deceased husband, on the petition of the latter's administrator, yet, if she be dead and her heirs are made parties to the petition, a sale of the whole, under an order of the court, will deprive them of title.

SAME.—Receipt by Heir of Purchase-Money.—Estoppel.—Where an heir, having full knowledge that the whole estate in the land has been sold on petition of the administrator, receives and retains the purchase-money remaining after the payment of debts, he can not avoid the sale. *Elkott v. Frakes*, 71 Ind. 412, distinguished.

From the St. Joseph Circuit Court.

W. W. Woollen and *A. Anderson*, for appellant.

L. Hubbard and *W. G. George*, for appellees.

ELLIOTT, J.—Valentine Bumb died the owner of the real estate in controversy, leaving surviving him his widow, Sophia Bumb, and his son, the appellant, Charles Bumb. The administrator of the estate of Valentine Bumb filed a petition asking for the sale of all the land, and to this petition the appellant, the son of the deceased, was made a party. An order was made directing the sale of all the land, and John Ruddick, the appellees' grantor, became the purchaser. Sophia Bumb, the widow of the intestate and mother of the appellant, died in the year 1870, and the petition to sell the land was filed in 1873. The administrator accounted to the guardian of the appellant for the proceeds of the sale of the land, and the guardian afterwards paid to the appellant nine hundred and fifteen dollars, which he still retains with knowledge that the money was the avails of the sale of all the real estate remaining after payment of debts.

The court would have had no authority to sell the interest of the appellant's mother had she been living, but the order for the sale of the interest of the mother would have been beyond the power of the jurisdiction of the court. It would

107	575
131	575
107	575
137	132
107	575
141	179
107	575
150	603
107	575
156	615
156	619

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have been void had she been living at the time the order was made, for it is well settled by our decisions that an order directing the sale of the widow's interest to pay the debts of her deceased husband, is void for want of jurisdiction. *Kent v. Taggart*, 68 Ind. 163; *Armstrong v. Cavitt*, 78 Ind. 476; *Pepper v. Zahnsinger*, 94 Ind. 88; *Clark v. Deutsch*, 101 Ind. 491, see p. 494; *Bryan v. Uland*, 101 Ind. 477. But here the widow died long prior to the time the order was made, and the rule does not apply.

It is a well established rule that children who are made parties to an administrator's petition to pay debts are bound by the order of the court as to existing titles, but not as to titles afterwards acquired. *Elliott v. Frakes*, 71 Ind. 412; *Avery v. Akins*, 74 Ind. 283; *Kenney v. Phillippy*, 91 Ind. 511, and cases cited; *Bryan v. Uland*, *supra*; *Thorp v. Hanes*, *ante*, p. 324.

In this instance, the appellant had title to his mother's one-third interest at the time the petition was filed; that title he acquired at her death in 1870. The judgment on the administrator's petition, it would seem clear, does, therefore, deprive him of title. *Lantz v. Maffett*, 102 Ind. 23.

There is still another rule which requires consideration here, and that is this: Where a party is sued in one capacity only, the judgment estops him as to the capacity in which he is sued, and none other. *Craighead v. Dalton*, 105 Ind. 72, see p. 76; *Lord v. Wilcox*, 99 Ind. 491; *Elliott v. Frakes*, *supra*; *Unfried v. Heberer*, 63 Ind. 67; *Bigelow Est.* 65; *Freeman Judg.*, section 156.

In this case, if the appellant had been sued solely in the capacity of heir of his father, no right subsequently enuring to him as the heir of his mother would have been adjudicated; but here the appellant's mother died in 1870, three years prior to the filing of the petition, and it would seem that the case falls within the rule declared in the cases of *Lantz v. Maffett*, *supra*, *Carver v. Carver*, 97 Ind. 497, *Stock-*

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well v. State, ex rel., 101 Ind. 1, and *Craighead v. Dalton, supra.*

There is another principle which applies here, and in itself is sufficient to rule the case against the appellant. Where an heir, having full knowledge that all of the estate in the land has been sold on the petition of the administrator, receives and retains the purchase-money remaining after the payment of debts, he can not avoid the sale. He can not have both the money and the land. Equity will not uphold such a claim. In accordance with this general doctrine, it has often been held that an heir who has full knowledge of his right, and with such knowledge receives and retains the purchase-money, can not vacate the sale and obtain the land. This principle is often applied in analogous cases. *Smith v. Warden*, 19 Pa. St. 424; *Evans v. Snyder*, 64 Mo. 516; *Davis v. Handy*, 37 N. H. 65; *Colbert v. Daniel*, 32 Ala. 314; *Storrs v. Barker*, 6 Johns. Ch. 166; *State v. Stanley*, 14 Ind. 409, and cases cited p. 412; *Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63, see p. 66; *Morris v. Stewart*, 14 Ind. 334.

The record before us shows that the administrator accounted to the appellant for all of the proceeds of the sale, and this distinguishes the case from *Elliott v. Frakes, supra*, for there the court said that the inference was that the only avails received by the heirs were those arising from a sale of their interest. It has been held, in accordance with the general principle of equity here stated by us, that if the widow, with knowledge of all the facts, elects to receive the purchase-money, she can not, so long, at least, as she retains the money, successfully dispute the validity of the sale, and that principle must apply here. *Pepper v. Zahnsinger, supra.*

Judgment affirmed.

Filed Oct. 8, 1886.

Trout v. The State.

No. 13,380.

TROUT v. THE STATE.

CRIMINAL LAW.—*Affidavit and Information.*—*Variance Between, as to Date of Offence.*—*Clerical Error.*—*Uncertainty.*—*Motion to Quash.*—The affidavit charged that the offence was committed October 21st, 1885. The information charged that it was committed October 21st, 1886. The affidavit was sworn to January 16th, 1886, and both affidavit and information were filed on the latter date.

Held, that the date as given in the information is a mere clerical error, and in the absence of a motion to quash for uncertainty, the error is not available on appeal, as it did not prejudice the substantial rights of the defendant.

SAME.—*Arrest of Judgment.*—A motion in arrest of judgment will not be sustained for mere defects or uncertainties in a criminal pleading.

From the Sullivan Circuit Court.

J. T. Hays, H. J. Hays, J. C. Briggs and W. C. Hultz, for appellant.

F. T. Hord, Attorney General, *S. W. Axtell*, Prosecuting Attorney, *J. W. Shelton* and *J. S. Bays*, for the State.

Howk, C. J.—Upon affidavit and information, the appellant herein was prosecuted, tried by a jury and found guilty of an assault and battery, with intent to commit rape, upon one Augusta Folske, and his punishment was assessed at imprisonment in the State prison for the term of seven years, and a fine in the sum of \$400. Over his motion in arrest, the court rendered judgment against appellant, upon and in accordance with the verdict of the jury.

The overruling of his motion in arrest of judgment is the only error assigned here by the appellant.

This motion was in writing, and the appellant assigned therein the following causes, for the arrest of judgment, namely:

“1. Because the facts stated in the information do not constitute a public offence under the laws of Indiana.

“2. Because the information is not supported by a good

107	578
127	410
107	578
126	294
107	578
140	444
141	111
107	578
150	85
107	578
165	446
165	449

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affidavit, charging the same offence stated and charged in the information.

"3. Because the affidavit and information, in this cause, do not charge the same offence.

"4. Because the information alleges that the offence was committed on October 21st, 1886, and the affidavit charges an offence as having been committed on October 21st, 1885.

"5. Because the dates in the affidavit and information, fixing the time at which the said offence is alleged to have been committed, are different dates."

It will be readily seen from these written causes, that appellant's motion in arrest was predicated solely upon the fact, apparent in the record, that while the affidavit charged that the offence was committed on the 21st day of October, 1885, the information charged that it was committed on the 21st day of October, 1886. It is shown by the record that the affidavit was sworn to by the prosecuting witness on the 16th day of January, 1886, and that, on the same day, such affidavit and the information founded thereon were both filed in the court below. The information shows upon its face, that it was intended to charge the appellant therein and thereby with the commission of a past offence, and the same offence whereof the prosecuting witness, "Augusta Folske, has this day complained on oath." Construing the affidavit and information as constituting a single criminal charge, and taking into consideration the date of the filing as heretofore stated, it seems clear to us that the use of the figures 1886, in the charging part of the information, is a palpable clerical error, and that the date of the commission of the offence charged was correctly stated in the affidavit, but not in the information. The utmost that can be said, however, of the legal effect of the difference between the dates given of the commission of the offence, in the affidavit and in the information, is, that the written charge of such offence was not sufficiently certain. "That the * * * information does not state the offence with sufficient certainty," is the *fourth* statutory cause

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for which a defendant may move to quash an information. Section 1759, R. S. 1881. If the appellant had moved the trial court to quash the information in this case, it would have been error, under our decisions, to have overruled such motion. *Dyer v. State*, 85 Ind. 525; *Murphy v. State*, 106 Ind. 96.

In the case in hand, however, no motion to quash the information was made by the appellant; but after trial and the verdict of a jury finding him guilty of the offence charged, he sought to avail himself of the technical defects and uncertainties in the affidavit and information, resulting clearly from a merely clerical error, by his motion in arrest of judgment. This he can not do, we think, under our law. Our statute provides, that a motion in arrest may be granted by the court, in a criminal case, for either of the following causes: 1. Where the offence charged is not within the jurisdiction of the court; and 2. Where the facts stated in the indictment or information do not constitute a public offence. Section 1843, R. S. 1881. In this case, there is no pretence that the offence charged was not within the jurisdiction of the trial court; but it is claimed that the facts stated do not constitute a public offence, solely, however, because of the clerical error in the date of the offence as stated in the information. We are of opinion that there was no defect, imperfection or uncertainty in the affidavit and information in this cause, which could possibly tend to the prejudice of the substantial rights of the appellant upon the merits; and surely it can not be claimed that the facts stated, in such affidavit and information, did not constitute a public offence. For mere defects or uncertainties in a criminal pleading, a motion in arrest will not be sustained. This is settled by our decisions. *Greenley v. State*, 60 Ind. 141; *Bright v. State*, 90 Ind. 343; *Graeter v. State*, 105 Ind. 271.

In section 1891, R. S. 1881, it is provided as follows: "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors

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or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

This section of the statute prescribes the rule which should govern this court in the consideration of all appeals in criminal causes. Applying this rule to the case in hand, we are forced to the conclusion that there are no errors, defects or exceptions, in the record of this cause, which could or did prejudice the substantial rights of the appellant; and in such case, of course, the statute requires us to affirm the judgment below. *Clayton v. State*, 100 Ind. 201; *Padgett v. State*, 103 Ind. 550; *Henning v. State*, 106 Ind. 386.

The judgment is affirmed, with costs.

Filed Oct. 8, 1886.

No. 12,943.

THE STATE v. THE EVANSVILLE AND TERRE HAUTE
RAILROAD COMPANY.

CRIMINAL LAW.—*Appeal by State.—Motion to Quash.—Pendency of Case.—*

While a criminal case is still pending on one count of the indictment, the State can not appeal from a ruling quashing another count. Sections 1846 and 1882, R. S. 1881, considered.

From the Knox Circuit Court.

F. T. Hord, Attorney General, *W. A. Cullop*, Prosecuting Attorney, *G. W. Shaw*, *C. B. Kessinger* and *J. S. Pritchett*, for the State.

A. Iglehart, *J. E. Iglehart* and *E. Taylor*, for appellee.

MITCHELL, J.—The Evansville and Terre Haute Railroad Company, in an information containing two counts, was charged with having violated sections 2142 and 2143, R. S. 1881, which relate to the obstruction of navigable streams.

107	581
139	468
107	581
144	656
107	581
148	181

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Pursuant to the provisions of section 1685, R. S. 1881, the railroad company was summoned to answer the information. It appeared by counsel, and moved to quash both counts. The motion was sustained as to the first count, and overruled as to the second. Upon an exception to the ruling of the court in sustaining the motion to quash the first count, the State has appealed, and has assigned this ruling as error.

Whether a trial was had on the second count, or if had, with what result, the record does not disclose. It seems to be conceded in argument that the case is still pending in the court below upon that count.

The question is now made, that until a final judgment is reached, which disposes of the whole case, no appeal lies. Appeals by the State, in criminal cases, are authorized and regulated by sections 1846 and 1882, R. S. 1881.

Under the first mentioned section, the prosecuting attorney may, upon exception, reserve a point of law for the decision of the Supreme Court, and, in case of the acquittal of the defendant, may take the question so reserved to the Supreme Court for decision by appeal within one year. Under the latter section, an appeal may be taken by the State "Upon a judgment for the defendant, on quashing or setting aside an information or indictment," or "Upon an order of the court arresting the judgment," or "Upon a question reserved by the State."

The construction which these sections have received, and the only construction of which they are capable, is, that an appeal can only be taken by the State, upon a question reserved, in case the defendant has been acquitted. *State v. Hamilton*, 62 Ind. 409.

The only other instances in which an appeal may be taken by the State are, either when a judgment for the defendant on quashing or setting aside an information or indictment is given, or when, after trial and conviction, a motion in arrest has been sustained by the court.

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The judgment for the defendant on a motion to quash the information or indictment, which will authorize an appeal by the State, must be a judgment which finally disposes of the whole case, and not merely a ruling quashing one or more counts of an indictment, leaving other counts upon which the trial may proceed.

Doubtless, a ruling of the court, quashing an indictment or information in part, would be such an opinion of the court given during the prosecution of a cause as might be reserved under section 1846, and from which an appeal could be taken in case of the acquittal of the defendant upon the final trial.

The result of all the decisions is, that it is only from final judgments that appeals can be taken, unless otherwise specially authorized by statute, and it is only after judgment for the defendant, either of final acquittal, or in quashing or setting aside the whole information or indictment, that an appeal may be taken by the State. *State v. Spencer*, 92 Ind. 115; *Wingo v. State*, 99 Ind. 343.

The case of *State v. Swope*, 20 Ind. 106, does not support the argument on behalf of the State here. That case decides nothing more than that the judgment or ruling of the court, that the information be quashed, is a sufficiently formal judgment for the defendant, to authorize an appeal by the State. The reason given there is that it puts an end to the case. This could only be so in case the whole indictment was quashed, as a result of the ruling or judgment of the court.

The appeal is dismissed.

Filed Oct. 9, 1886.

The Board of Commissioners of Marion County v. Center Township.

No. 13,182.

THE BOARD OF COMMISSIONERS OF MARION COUNTY v. CENTER TOWNSHIP.

ELECTIONS.—*Expenses of Township Elections Must be Paid by County.*—Under existing statutes, the necessary expenses of township as well as general elections must be borne by the county and paid by the board of commissioners out of county funds.

From the Marion Superior Court.

F. J. Van Vorhis, W. W. Spencer, S. Claypool and W. A. Ketcham, for appellant.

H. N. Spaan and J. R. Carnahan, for appellee.

Howk, C. J.—In this case the questions for our decision are fairly presented, as well for the appellant as for the appellee, by the following error assigned by appellant, in general term of the court below, namely: That the court, at special term, erred in its conclusion of law upon the facts found.

At appellant's request the court made a special finding of the facts of this case, in substance, as follows:

1. At the election for township officers, held in April, 1886, there became due to the several officers of the election boards, for their services as such, the aggregate sum of \$1,386.

2. Meals were furnished to such election boards at an aggregate expense of \$315.

3. An expense on account of renting rooms, in which to hold such elections, was incurred, amounting to the sum of \$315.

4. Stationery, other than the stationery required to be furnished by the county auditor, was furnished by the township trustee, amounting to \$10.50.

5. The ballot-boxes were repaired and delivered to the various polling-places at an expense of \$68.70.

6. Certain of the ballot-boxes were sent for by the board of canvassers at an expense of \$6.

7. There was an expense in hauling chutes to the polling-places of \$25.

The Board of Commissioners of Marion County v. Center Township.

Since said election the township trustee of Center township had paid each and every of the above and foregoing items of expense growing out of said elections, and had properly demanded payment thereof from the defendant, which was refused.

The court at special term stated, as its conclusion of law upon the foregoing facts, that the plaintiff, Center township, was entitled to recover of the defendant, the board of commissioners, etc., the sum of \$2,126.20, being the aggregate amount of the expenses of the April election, 1886, in Center township, as found by the court.

Under our government and laws, elections must be held at stated times, and, of course, all necessary expenses, incurred in holding such elections, must be borne and paid out of public funds. It is not claimed in the case in hand, that the expenses of the April election, 1886, or any part thereof, were improper or unnecessary. But the appellee insists that all the expenses incurred, growing out of such election, were payable, under the law, out of the county funds, and that Center township, having paid the amount of such expenses, has a valid claim against appellant for reimbursement out of the funds of the county. The trial court adopted the views of the appellee, on the question in controversy, and rendered judgment in its favor against appellant for the full amount of the expenses of such election, and this judgment was affirmed by the court in general term.

It would seem to be clear, that all the expenses incident to a general election must be borne and paid by the proper county board out of the proper county treasury. The statute concerning elections, etc., in force since September 19th, 1881, provides for the holding of an election in each township of each county in the State, on the first Monday of April, 1882, and every second year thereafter, for the purpose of electing certain officers for the township. Of course, it would have been competent for the Legislature to have provided that the expenses of such election, should be borne

The Board of Commissioners of Marion County v. Center Township.

by the proper township, and paid out of the township funds. But the statute contains no such provision. It does provide that such township elections "shall be conducted by the officers of and governed by the provisions of the law with respect to general elections so far as applicable." Section 4735, R. S. 1881. Under this provision, the county boards have the same powers, and must exercise the same duties, in relation to township elections, which the statute confers on them with respect to general elections. The county board must provide a voting place in each precinct, and must divide a precinct into two or more precincts, whenever public convenience or the public good may require it, as well for township elections as for general elections. Blank forms of poll-books and other forms must be furnished for township elections, as for general elections, and paid for out of the county treasury. The county board must provide, at the expense of the county, a ballot-box for each precinct in the township, for township as well as for general elections. So, also, meals must be furnished to the members of the election board, at the regular hours for meals, during the election day and until the count is finished, at the expense of the county, as well in township as in general elections.

Construing together all the provisions of the statute concerning elections, which are applicable to all elections alike, we are of opinion that, it was the intention of the Legislature, in the enactment of such statute, that the necessary expenses of all elections, township as well as general, should be borne and paid by the proper county board, out of the funds of such county. We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 9, 1886.

Hensley *et al.* v. The State.

No. 12,932.

107 587
1168 590

HENSLEY ET AL. v. THE STATE.

CRIMINAL LAW.—*Plea of Former Jeopardy.*—*What Must be Shown.*—In pleading a former jeopardy it is not sufficient to show that a jeopardy once attached to the defendant, but it must also be shown that it was not waived by him by any act, or discharged by operation of law.

SAME.—*Nolle Prosequi to Count of Indictment During Trial.*—*Former Jeopardy.*—Where a plea of former jeopardy shows that during the first trial the State was permitted, over defendant's objection, to dismiss as to one count in the indictment, and that the trial proceeded on another count, which was substantially the same as the indictment to which the plea is addressed, but the plea fails to show the result of such trial, it is bad. The inference in such case is that there was no final judgment on the count on which the trial was had, in which event another trial thereon, or on a new indictment embracing the same facts, is proper.

From the Marion Criminal Court.

J. W. Gordon, L. O. Bailey, W. T. Brown and C. F. Robbins, for appellants.

W. N. Harding, Prosecuting Attorney, *B. Harrison, W. H. H. Miller, J. B. Elam and J. B. Kealing,* for the State.

NIBLACK, J.—On the 11th day of June, 1885, the grand jury of Marion county returned an indictment in two counts against Charles S. Hensley and John Dearbaugh, for procuring an abortion upon the body of one Mary S. Hensley, a pregnant woman, in violation of the provisions of section 1923, R. S. 1881.

The first count charged the miscarriage of the said Mary S. Hensley, by the use of an instrument with intent to produce such a result.

The second count charged the miscarriage of the said Mary S. Hensley, by the like use of an instrument, by reason of which she afterwards died.

Upon his appearance to the indictment, Charles S. Hensley pleaded specially that, on the 11th day of February, 1885, the grand jury of Marion county found and returned into court an indictment against him, in three counts; that the

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first count charged him, the said Charles S. Hensley, with having, on the 14th day of January, 1885, unlawfully, feloniously and wilfully used an instrument upon the person of Mary S. Hensley, with the intent thereby to procure and produce the miscarriage of the said Mary S. Hensley, by reason of which she, the said Mary, miscarried, and afterwards, on the 19th day of January, 1885, died; that the second count charged him, the said Charles S. Hensley, with having, at the time named, and in the same manner, and with like intent, used an instrument on the person of the said Mary S. Hensley, by reason whereof, and on account of which she, the said Mary, afterwards died; that the third count charged John Dearbaugh with having, on said 14th day of January, 1885, unlawfully, feloniously and wilfully introduced an instrument into the womb of the said Mary S. Hensley, with intent thereby to procure and produce the miscarriage of her, the said Mary S. Hensley, whereof she, the said Mary, thereafter, on said 19th day of January, 1885, died, and further charged the said Charles S. Hensley with having feloniously incited, encouraged, counselled, procured, hired and commanded the said Dearbaugh to commit the crime so perpetrated by him; that, on the 12th day of February, 1885, he, the said Charles S. Hensley, was arraigned upon said indictment and entered a plea of not guilty thereto; that afterwards, on the 25th day of May, 1885, a *nolle prosequi* was entered as to the second count of such indictment, and all further proceedings on said count were, in consequence, discontinued; that thereupon the cause was called for trial and a jury was impanelled and sworn to try the issues formed upon the first and third counts of said indictment; that the parties then proceeded with the trial of said cause, including the introduction of evidence, which was continued until the 27th day of said month of May; that, on said last named day, and before the argument was commenced, the prosecuting attorney asked leave to withdraw the third count of the indictment from the consideration of the jury, and to dismiss

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the cause as to said third count; that over his, the said Charles S. Hensley's objection, the leave thus asked for was granted, and the cause as to such third count of the indictment was accordingly dismissed; that the cause was thereafter submitted to the jury on the issue joined on the first count of the indictment; that the parties named and described in said third count of the indictment in question were the same as those named and described in the indictment in this case, and that the crime charged in such third count was based upon the same transaction constituting the alleged crime charged in this case; that by reason of the matters herein above set forth, he, the said Charles S. Hensley, has, through the medium of said third count of the indictment so returned against him on the 11th day of February, 1885, been once put in jeopardy on the charge contained in the indictment in this case, and that, on that account, he ought not to be further tried, vexed or harassed on or by reason of such charge.

A demurrer was sustained to this plea, and upon a plea of not guilty Hensley, the appellant here, was found guilty as charged in the second count of the indictment in this case, and sentenced to pay a fine of \$50, and to be imprisoned in the State's prison for the term of three years.

Error is assigned only upon the decision of the criminal court sustaining a demurrer to the special plea, the substance of which is given as above.

As applicable to our system of criminal jurisprudence, the question presented in this case is a novel one, and not entirely free from difficulty. It is now, however, well settled, that where a defendant in a criminal prosecution is put upon trial on a valid indictment before a jury lawfully empanelled and sworn, and the jury is discharged before a verdict is returned, without good cause, and without his consent, he has been put in jeopardy within the constitutional meaning of that term, and that the discharge of the jury in such a case is equivalent to a verdict of not guilty of the offence charged. *Wright*

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v. *State*, 5 Ind. 290; *State v. Walker*, 26 Ind. 346; *Maden v. Emmons*, 83 Ind. 331; *Doles v. State*, 97 Ind. 555.

And, upon the same principle, it has been, in legal effect, held, and we have no doubt correctly, that where the defendant in a criminal cause has been placed upon trial before a competent jury, and a *nolle prosequi* is afterwards entered, over his objection, and allowed to prevail to the indictment or some count thereof, he can not be again tried upon the indictment, or count of such indictment, to which a *nolle prosequi* has been so entered. *Mount v. State*, 14 Ohio, 295.

But, so far as we are advised, it has never been either held, or judicially intimated, that the entry and allowance of a *nolle prosequi*, under such or similar circumstances, to one count of an indictment, either arrests or restrains further proceedings upon another count of the same indictment. Neither has it, within our knowledge, ever been either held, or judicially intimated, that where a defendant has been found guilty upon one count of an indictment, and not guilty upon another count of the same indictment, he may not be again tried upon the count upon which he has been so found guilty, in the event that a new trial has been granted, or the judgment arrested, upon that count. *Esmen v. State*, 1 Swan Tenn. 14; *Gerard v. People*, 3 Ill. 362; *Durham v. People*, 4 Ill. 172; *Weinzorpfli v. State*, 7 Blackf. 186; *Dickinson v. State*, 70 Ind. 247; *Lamphier v. State*, 70 Ind. 319; *Harvey v. State*, 80 Ind. 142.

The striking peculiarity of the state of facts relied on in this case is, that there was no averment as to the result or outcome of the trial upon the first count of the indictment returned against the appellant on the 11th day of February, 1885. In pleading a former jeopardy in a case like the one at bar, it is not sufficient to show that a jeopardy had once attached to the defendant. It must also be shown that the jeopardy so attaching was not discharged by operation of law or waived by some act of the defendant. There being no averment either of a conviction or acquittal upon the count in question,

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the inference was that there was no final judgment upon that count—either that the jury, for some good reason, failed to return a verdict, or else that a new trial was granted, or the judgment arrested—and that in consequence another trial might have been had upon such count. As the cause thus presumably stood over for another trial on one count of the indictment, it was competent for the prosecuting attorney to abandon the cause on that count, and to have a new indictment returned, based upon and embracing substantially the same facts. As a careful examination will disclose, the indictment in this case contains substantially the same facts as those charged in the first count of the former indictment, being only separated into two counts instead of one.

Our conclusion therefore is that the facts specially pleaded in this case would have constituted a good defence of jeopardy to the particular matters alleged in the third count of the former indictment, but did not make a case of former jeopardy on the facts charged in the first count of that indictment and repeated in the indictment in the present case.

No cause has, consequently, been shown for a reversal of the judgment below.

The judgment is affirmed, with costs.

Filed Oct. 9, 1886.

No. 12,681.

CLEVELAND v. OBENCHAIN.

SURVEY.—*Appeal from Survey Fixing Boundary Lines.*—*Parol Evidence.*—On an appeal from a survey fixing boundary lines, made by the county surveyor or the surveyor appointed by the court, parol evidence may be heard for the purpose of ascertaining the true lines, however acquired.

EVIDENCE.—*Decree Construing Deed.*—A decree which construes a deed forming one of the links in a party's title, is competent evidence, even though it may not be conclusive as against strangers.

107	591
130	110
107	591
138	490
107	591
150	624
152	434

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REAL ESTATE.—Deed.—Description.—Highway.—Boundary.—Where land is described as bounded by an existing road or street, it is to be construed as referring to one actually opened and in use by the public.

SAME.—Where a road has been opened and used for a long period of time, a vendee, who buys land described as bounded upon it, can not be affected by the fact that it was not laid out according to the original order.

HIGHWAY.—User.—Dedication.—Evidence.—It is competent to prove the length of time a road has been laid out and used by the public, as user under color or claim of right will establish a dedication.

NOTICE.—Appearance.—Waiver.—Where there is an appearance without objection, or where there is any act indicating consent, want of notice will be deemed waived.

From the Whitley Circuit Court.

T. R. Marshall, W. F. McNaghy and J. W. Adair, for appellant.

M. Sickafoose and J. S. Collins, for appellee.

ELLIOTT, J.—This case is in this court for the second time. *Cleveland v. Obenchain*, 89 Ind. 274. It was sent back to the trial court, and after it reached there a trial was had resulting in favor of the appellee.

The first question is this: Is it proper for the court, on an appeal from a survey made by the county surveyor, or the surveyor appointed by the court, to hear parol evidence? This question is answered in the affirmative by the decision in *Wingler v. Simpson*, 93 Ind. 201, for the principle there asserted rules here. It is a familiar doctrine that parties by acquiescing in boundary lines for twenty years, or by conduct fixing such lines, may be estopped from averring that they are not the true lines. *Brown v. Anderson*, 90 Ind. 93; *Main v. Killinger*, 90 Ind. 165; *Pitcher v. Dove*, 99 Ind. 175. As boundaries may be fixed by possession and by estoppel, it is proper to introduce evidence tending to prove possession for the statutory period, or to prove possession for a shorter period, conjoined with facts constituting an estoppel. It would be a useless waste of time and an unjust burden upon the public to try a case on appeal from a survey solely upon recitals and

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statements in deeds and records. Parol evidence is often necessary to enable the court or surveyor to ascertain the true boundaries. The object of such a trial is to ascertain and establish the true boundary, and to effect this object it is proper to give evidence tending to prove what the parties have said and done touching the boundary lines.

A land-owner who submits to a survey does not by so doing lose any of his land. In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land, or any part of it. The object of the statute, in permitting the parties to try the correctness of the survey, was not to confine either to a mere paper title, but to permit them to establish the true title and boundary lines, howsoever acquired or fixed. It would produce great confusion and work much injustice if parties could only try the correctness of a survey by the descriptions found in the conveyances. It is a familiar rule that it is not the office of a description to identify lands, but simply to furnish the means of identification. *Rucker v. Steelman*, 73 Ind. 396; *Lanman v. Crooker*, 97 Ind. 163 (49 Am. R. 437). Parol evidence is, therefore, often necessary to make descriptions intelligible.

There was no error in admitting in evidence the record of the injunction suit to which the appellant was a party. The decree in that case gave a construction to a deed forming a link in the appellant's chain of title, and also tended to prove the boundary lines of his land. Where a decree gives construction to a deed forming one of the links in a party's title, it is competent evidence, even though the decree may not be conclusive as against strangers.

Where land is described as bounded by an existing road or street, it is to be construed as referring to one actually opened and in use by the public. 3 Washb. Real Prop. (3d ed.) 360. Where a road has been opened and used for a long

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period of time, a vendee who buys property described as bounded upon it can not be affected by the fact that it was not laid out according to the original order.

It is competent to prove the length of time a road has been laid out and used by the public. User, under color or claim of right, will establish a dedication as effectually as an express grant. *Strong v. Makeever*, 102 Ind. 578.

It is contended that the court erred in its judgment, because it does not appear that the appellant had notice of the re-survey.

We think there was a waiver of notice. It is well settled that where there is an appearance, without objection, or, indeed, where there is any act indicating consent, want of notice will be deemed waived. *Sunier v. Miller*, 105 Ind. 393, and cases cited.

Judgment affirmed.

Filed Oct. 12, 1886.

No. 12,639.

PARKHURST ET AL. v. THE WATERTOWN STEAM ENGINE
COMPANY ET AL.

MORTGAGE.—Promissory Notes.—Assignment of Part of Series.—Priority of Lien.—The assignment of one or more of a series of notes executed by the same person, and secured by mortgage, operates as an assignment, *pro tanto*, of the mortgage. The notes so assigned stand as so many successive mortgages, and the holders have priority of lien in the order in which their respective demands become due.

SAME.—Retention of Part of Series of Notes by Mortgagee.—Rights of Assignees Holding Other Notes.—The assignees of a part of a series of notes secured by mortgage are entitled to payment out of the mortgage fund, in preference to the notes retained by the mortgagee, although the latter mature first; but this rule does not affect the rights of the assignees as between themselves, and where they take their assignments at the same time, their notes will have preference according to the date of their maturity.

From the Johnson Circuit Court.

107	594
135	102
107	594
147	311

Parkhurst et al. v. The Watertown Steam Engine Company et al.

R. M. Miller and H. C. Barnett, for appellants.

G. M. Overstreet, A. B. Hunter, C. F. Rooker and A. W. Hatch, for appellees.

ZOLLARS, J.—The facts involved in the controversy between the parties were found specially by the court below, and, so far as material for the purposes of this decision, are as follows :

On the 10th day of August, 1882, Stephen W. Pangburn, executed and delivered to one of the appellees, the Northwestern Manufacturing and Car Company, three promissory notes payable at a bank, and to become due, respectively, on the 1st day of November, 1882, the 1st day of November, 1883, and the 1st day of November, 1884. On the 27th day of November, 1882, and before any of the notes had been assigned, Pangburn executed and delivered to the Northwestern Manufacturing and Car Company a chattel mortgage to secure the payment of the notes. That company retained the note first to become due, and before their maturity, by written endorsements in blank, assigned the other notes, the one to become due on the 1st day of November, 1883, to appellee, the Watertown Steam Engine Company, and that to become due on the 1st day of November, 1884, to appellants. On the 15th day of November, 1883, Pangburn, to further secure the two notes first falling due, and in consideration of an extension of the time of their payment, executed a second chattel mortgage to the Northwestern Manufacturing and Car Company. All of the property so mortgaged was not sufficient in value to pay the three notes, nor any two of them. Pangburn is insolvent, and the Northwestern Manufacturing and Car Company is a non-resident corporation.

Upon its conclusions of law, based upon the facts so found, the court below decreed that the mortgages should be foreclosed, the property be sold, and the proceeds applied, first, to the payment of the note second to become due, and held

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by the Watertown Steam Engine Company, and the residue, if any, to the payment of the note last to become due, and held by appellants, etc.

The only fault found by appellants with the conclusions of law and the decree is, that they were not allowed to share *pro rata* in the proceeds to be derived from the sale of the mortgaged property, with the Watertown Steam Engine Company, the holder of the note first falling due, after that retained by the payee and mortgagee.

It is settled in this State, that the assignment of one or more notes, made to the same person and secured by a mortgage, operates as an assignment, *pro tanto*, of the mortgage, and that the holders of the several notes have priority of lien in the order in which their respective demands become due. The notes so assigned stand as so many successive mortgages. *People's Savings Bank v. Finney*, 63 Ind. 460, and cases there cited; *Shaw v. Newsom*, 78 Ind. 335; *Doss v. Ditmars*, 70 Ind. 451. See, also, *Richardson v. McKim*, 20 Kan. 346; 2 Jones Mort., sections 1699, 1701; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410; *Bryant v. Damon*, 6 Gray, 564; *Wright v. Parker*, 2 Aik. (Vt.) 212; *Salzman v. His Creditors*, 2 Rob. (La.) 241; *Winters v. Franklin Bank*, 33 Ohio St. 250.

The above authorities hold also, that an endorsee of a part of such notes so secured by mortgage, is entitled in equity to payment out of the mortgaged funds, in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to those retained by the mortgagee.

These propositions are not disputed by appellants, but they contend that, by reason of the endorsements, they are entitled to share *pro rata* with the Watertown Steam Engine Company in the proceeds of the mortgaged property. It does not appear by the special findings of facts whether or not the different notes were assigned at the same time, or at

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different times; and hence we are not called upon to decide what the equities as between the assignees might be, if the notes had been assigned at different times. Presuming in favor of the correctness of the rulings of the court below until error is affirmatively shown by the record, we assume that the notes were assigned at the same time.

Appellants' theory is, that because of the equitable rule which postpones the payment of the notes retained by the payee and assignor out of the mortgage fund, to the payment of the notes assigned, the court takes into its custody the amount due upon the note so retained, for distribution among the other note holders. This theory, we think, is incorrect. The equitable rule rests upon the theory that as between the assignor and assignee, by the assignment of the notes, the assignor assigns the mortgage not *pro rata*, but *pro tanto*; that is, he does not assign a proportionate share of the mortgage security, but assigns so much of the security as shall be adequate for the payment of the note or notes which he assigns.

The assignor thus surrenders any preference he may have by reason of the note or notes retained by him first becoming due. In other words, the payment of his first mortgage is postponed to the payment of the subsequent mortgages of the assignees. Equity says to the mortgagee and assignor, in such a case, that having assigned the notes subsequently becoming due, he shall not enforce his prior lien as against his assignees holding the subsequent liens. But that postponement does not change the priority of the liens held by the assignees, nor in any way change the relation of those liens to each other. In such a case, the subsequent liens will be adjusted as though there had been no prior lien in favor of the mortgagee; that is, the notes held by the assignees will have preference according to the date of their maturity. *State Bank v. Tweedy*, 8 Blackf. 447 (46 Am. Dec. 486); *Hough v. Osborne*, 7 Ind. 140; *Davis v. Langsdale*, 41 Ind. 399;

 Murphy v. The State.

Doss v. Ditmars, supra; Bank of United States v. Covert, 13 Ohio, 240.

As the court below ruled in accordance with this opinion, the judgment must be affirmed.

Judgment affirmed, with costs.

Filed Oct. 14, 1886.

No. 13,147.

MURPHY v. THE STATE.

From the Owen Circuit Court.

E. C. Steele, W. Hickam and D. E. Beem, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—Thomas Murphy, the appellant, was indicted for selling less than a quart of intoxicating liquor, without a license, to one Samuel Baldon, on the 19th day of October, 18184, and, in disregard of a motion to quash the indictment, was tried and convicted of the offence with which he was thus charged. The precise question involved in this appeal was considered and decided in the case of *Murphy v. State*, 106 Ind. 96, and upon the authority of that case the judgment in this case can not be sustained.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion to quash the indictment.

Filed Sept. 14, 1886.

No. 12,649.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY Co. v.
MILLER.

No. 12,650.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY Co. v.
SPENCER.

No. 12,651.

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McKEE.

Rochester, Rensselaer and St. Louis Railway Co. v. Woodruff.

No. 12,652.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
FERGUSON.

No. 12,653.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
EDWARDS.

No. 12,654.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
COOK.

No. 12,655.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
JENKINS.

No. 12,656.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
FULKERSON.

No. 12,657.

ROCHESTER, RENSSELAER AND ST. LOUIS RAILWAY CO. v.
WOODRUFF.

From the Miami Circuit Court.

J. Stick and *E. Myers*, for appellant.*W. I. Howard*, *J. H. Bibler*, *M. L. Essick* and *G. W. Holman*, for appellees.

Howk, C. J.—In each of the above entitled causes, the same questions are presented for decision, in the same manner and by the same appellant, as those which were considered and decided by this court, at its present term, in *Rochester, etc., R. W. Co. v. Jewell*, ante, p. 332. In each of such causes, therefore, we must hold upon the authority of the case cited and for the reasons given in our opinion therein, that no error was committed by the circuit court which would authorize the reversal of its judgment.

In each of the above entitled causes the judgment below is affirmed, with costs.

Filed Sept. 15, 1886.

Murphy v. The State.

No. 12,862.

ELLINGHAM v. THE BOARD OF COMMISSIONERS OF WELLS
COUNTY ET AL.

From the Wells Circuit Court.

N. Burwell, for appellant.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson, and J. J. Todd, for
appellees.

ZOLLARS, J.—This case is precisely the same as the case of *Johnson v. Board, etc.*, ante, p. 15, except that the appellant is a different person. Upon the authority of that case, the judgment is affirmed, at appellant's costs.

Filed June 16, 1886.

No. 13,148.

MURPHY v. THE STATE.

From the Owen Circuit Court.

E. C. Steele, D. E. Beem and W. Hickam, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—The indictment in this case charged the appellant with having sold intoxicating liquor, in a less quantity than a quart and without a license, to one Samuel Baldon, on the 15th day of February, 18185, and, upon a motion to quash, was held to be sufficient by the circuit court. A trial resulted in the appellant's conviction of the offence charged.

Upon the authority of the case of *Murphy v. State*, 106 Ind. 96; the motion to quash the indictment ought to have been sustained.

The judgment is reversed and the cause remanded, with instructions to sustain the motion to quash the indictment.

Filed Sept. 15, 1886.

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Pleading.—Sufficiency of Creditor's Claim.*—A claim against the estate of a debtor, who has made a voluntary assignment for the benefit of his creditors, is sufficient when it informs the assignee of the nature and amount of the creditor's demand. The strict rules of pleading will not be applied to such claims. *Fosdyke v. Nixon, 153*
2. *Same.—Purchase of Claims Against Debtor.—Enforcement Against Estate.*—A good-faith purchaser of claims against an embarrassed debtor, who has made an assignment of his property for the benefit of his creditors, is entitled to the distributive shares of the original holders of the claims, and may enforce payment against the debtor's estate in the hands of the assignee. *Id.*

ASSIGNMENT OF ERROR.

See CRIMINAL LAW, 4; PLEADING, 10; SUPREME COURT, 8.

ATTACHMENT.

See INJUNCTION, 2.

ATTORNEY AND CLIENT.

See ARGUMENT OF COUNSEL; CHANGE OF VENUE, 2, 3; PRACTICE, 2.

1. *Value of Services.—Evidence.—Jury.*—In determining the value of personal services, the jury must be governed by the evidence in the case. *Atkinson v. Dailey, 117*
2. *Same.—Reference to Third Persons to Fix Value.—Contract.*—Where services have been performed and no dispute exists as to their value, a mere oral reference to a third person to fix their value is not conclusive. *Id.*

BANKS AND BANKING.

See CONTRACT, 1; MORTGAGE, 5; TAXES, 1 to 3.

BILL OF EXCEPTIONS.

See INSTRUCTIONS TO JURY, 8; PLEADING, 20; PRACTICE, 2.

1. *Delay of Judge in Signing.—Practice.*—If a proper bill of exceptions is prepared and presented to the judge within the time allowed, his

- delay in signing and causing it to be filed, will not deprive the party of its benefit. *Ohio, etc., R. W. Co. v. Cosby, 32*
2. *Long-hand Manuscript of Reporter.*—The original long-hand manuscript of the evidence, as prepared by the official stenographer and certified by him, does not of itself constitute a bill of exceptions. It can only be certified to the Supreme Court in its original form, by being incorporated in a bill of exceptions. *R. S. 1881, section 1410.*
Marshall v. State, ex rel., 173

BOND.

- See APPEAL, 2; CITY, 11, 12; GUARANTY; REPLEVIN.
- Drainage.—Number of Sureties.—Dismissal.*—In the absence of any showing that a bond, with one surety, taken by the county auditor in a drainage proceeding instituted under section 4286, *R. S. 1881*, is insufficient in other respects, it is error to dismiss the petition on the sole ground that that statute seems to require more than one surety in the bond. See section 1221, *R. S. 1881.* *Schneck v. Cobb, 439*

BURDEN OF PROOF.

- See CONVEYANCE; DESCENT, 4; DRAINAGE, 1; GUARDIAN AND WARD, 4; LIFE INSURANCE, 3; PLEADING, 14; RAILROAD, 10, 13.

CASES MODIFIED, DISAPPROVED, ETC.

- Roll v. City of Indianapolis*, 52 Ind. 547, disapproved.
City of Fort Wayne v. Coombs, 75
- Albert v. State, ex rel.*, 65 Ind. 413, distinguished and modified.
North v. State, ex rel., 356
- Nelson v. Wilson*, 61 Ind. 255, and *Whiteman v. Swem*, 71 Ind. 530, criticised.
Langley v. Mayhew, 198
- Elliott v. Frakes*, 71 Ind. 412, distinguished.
Bumb v. Gard, 575
- Barr v. Barr*, 31 Ind. 240, followed.
Simons v. Simons, 197
- Edger v. Board, etc.*, 70 Ind. 331, and *Parker v. Board, etc.*, 84 Ind. 340, adhered to.
Stout v. Board, etc., 343

CERTIFICATE.

- See EXTRADITION, 4; OFFICE AND OFFICER, 1, 2.

CHANGE OF VENUE.

1. *Repeal of Statute.*—So much of the act of March 10th, 1873 (section 414, *R. S. 1881*), relating to changes of venue, as applied to criminal cases, was impliedly repealed by sections 1778 and 1779, *R. S. 1881.*
State, ex rel., v. Miller, 39
2. *Same.—Allowance to Counsel for Defence and Prosecution.—Liability of County in which Cause Originated.*—The court to which a criminal cause is taken on change of venue may, in its discretion, appoint counsel both to defend and to assist in the prosecution of such cause, and make allowances therefor out of the county treasury, which, under sections 1778 and 1779, may be collected from the county in which the cause originated. *Ib.*
3. *Same.—Conclusiveness of Allowances.*—The allowances made under such sections, as to their conclusiveness, stand upon the same footing as those made under the sections of *R. S. 1843*, construed in *Board, etc., v. Summerfield*, 36 Ind. 543. *Ib.*

CHATTEL MORTGAGE.

See PLEDGE.

1. *Recording.—Seniority.—Fraud.*—Where a chattel mortgage is not recorded within ten days, as required by statute, but a new mortgage, duly recorded, is given in renewal, the latter will be senior to an

intervening recorded mortgage, executed by the mortgagor upon the same property for the purpose of defrauding the first mortgagee.

McCormick v. Hartley, 248

2. *Same.—Foreclosure of Fraudulent Mortgage.—Injunction.*—A mortgagee of personal property, notwithstanding the mortgage debt is not due, and without regard to the solvency or insolvency of the mortgagor, may maintain a suit to enjoin the enforcement of a judgment of foreclosure rendered upon a mortgage executed to defraud him. *Ib.*

CHURCH PROPERTY.

Liability for Street Improvement.—Church property is subject to assessment for the improvement of a street on which it is situate.

Rausch v. Trustees, etc., 1

CITY.

See NEGLIGENCE, 8 to 10; STREET.

1. *Defective Sewers.—Contributory Negligence.—Case Disapproved.*—In actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from contributory negligence. *Roll v. City of Indianapolis, 52 Ind. 547, disapproved. City of Fort Wayne v. Coombs, 75*
2. *Same.—Use of Ordinary Care and Skill.—Notice of Defects.—Pleading.*—Where a municipal corporation constructs a sewer, it is bound to use ordinary care and skill, and it is not necessary that it should be averred in a complaint for injuries resulting from the defective construction thereof, that the corporate authorities had notice of defects caused by want of skill or care in doing the work. *Ib.*
3. *Same.—Corporate Authorities Must Keep Sewer in Repair.—Implied Notice of Defect.*—Notwithstanding the fact that a sewer may have been constructed with care and skill, a municipal corporation is liable for injuries caused by a negligent failure to keep it in repair; and where it is suffered to remain out of repair for such length of time as that it was the duty of the corporate authorities to take notice of its condition, the law will charge the corporate officers with notice. *Ib.*
4. *Same.—General Authority to Construct Sewers.*—The authority to construct sewers is general, and resides in all municipal corporations unless expressly denied them by the Legislature. *Ib.*
5. *Same.—Use of Private Property.—Liability for Negligence in Constructing and Maintaining Sewer.*—Where a municipal corporation makes use of private property for the purpose of constructing a sewer, and in order to obtain the privilege of using the property submits to the demand of the owner to construct the sewer according to plans and specifications prepared by him, it is liable for negligence in the construction and maintenance of such sewer. *Ib.*
6. *Same.—Outlet for Sewer.*—The outlet is a necessary part of a sewer, and whenever a municipal corporation, by its system of sewerage, renders an outlet necessary, it must provide one, and it must be constructed with ordinary care and skill. *Ib.*
7. *Same.—Liability to Citizen who Taps Sewer, for Negligent Construction or Maintenance Thereof.*—A municipal corporation is liable to one who, for his private benefit, connects his premises with a sewer constructed by such corporation, for injuries resulting from the negligent construction or maintenance thereof. *Ib.*
8. *Evidence.—Negligence.—Notice of Defects.*—In an action against a city to recover for injuries caused by a defective sewer, constructed by the corporate authorities, evidence of a break in the sewer about 100 feet distant from the point where the break occurred which caused the injury, for which recovery was sought, was competent for the pur-

- pose of charging the city with knowledge, as well as for the purpose of showing the defective character of the work, and materials employed, and that by reason of time and use the sewer had got out of repair. *Ib.*
9. *Same.*—In such case it is not error to permit the plaintiff to give in evidence the ordinance, advertisements, bids and contracts relating to the building of the sewer, as tending to show that the same was constructed by the city. *Ib.*
10. *Same.*—*Validity of Ordinance Providing for Construction of Sewer.*—In such case it is not necessary for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted. It is enough to show that the city had assumed to adopt it, and under it had constructed the sewer. *Ib.*
11. *Indebtedness.*—*Constitutional Limit.*—*Funding Bonds.*—Article 13 of the State Constitution, adopted March 14th, 1881, prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding two per centum on the value of their taxable property, and providing that all obligations in excess of such amount shall be void, is only prospective in its operation, and will not prevent such corporations from issuing new bonds, with coupons for future interest, for the purpose of funding debts, with accrued interest, existing prior to the adoption of such amendment.
Powell v. City of Madison, 106
12. *Same.*—*Effect of Constitutional Amendment Limiting Indebtedness.*—The only effect which the adoption of such constitutional amendment had upon sections 3230 and 3231, R. S. 1881, which provide for the funding of the indebtedness of cities and towns, was to limit their application to debts contracted prior to March 14th, 1881, and to such as have been since incurred, not in excess of the two per centum limit upon the value of their taxable property. *Ib.*
13. *City.*—*Parol Contract.*—*Statute of Frauds.*—*Purchase of Fire Engine.*—A municipal corporation may be bound by a parol contract; but such a contract for the purchase of a fire engine for a sum greater than fifty dollars is within the statute of frauds (section 4910, R. S. 1881) and invalid, unless it is brought within one of the exceptions to such section.
Over v. City of Greenfield, 231
14. *Same.*—*Common Council.*—*Resolution.*—*Regularity of Proceedings.*—*Presumption.*—*Pleading.*—Where the common council of a city, by resolution, accepts conditionally a proposition for the sale of a fire engine, the regularity of the proceedings by which such resolution was adopted will be presumed, and averments showing the particular manner of its adoption are unnecessary. *Ib.*
15. *Same.*—*Written Instrument.*—*Instruction.*—*Practice.*—Such resolution is not a written instrument within the meaning of section 362, R. S. 1881, and does not become part of an answer to a complaint to recover for the engine by being filed with it, and where its adoption is not otherwise verified by the record, an instruction construing it will not be considered. *Ib.*
16. *Same.*—*Construction of Contract.*—*Practice.*—Where the evidence is not in the record, and hence does not show what kind of a contract was proved to exist between the parties, an instruction construing the contract between them will not be considered. *Ib.*
17. *Same.*—*Sale.*—*Condition.*—*Fraud.*—*Pleading.*—*Surplusage.*—Where an answer to a complaint to recover the price of a fire engine alleges that the sale was only a conditional one, and that the plaintiff did not comply with the conditions, by reason of which the sale was not con-

- summed, other allegations of fraud and misrepresentation will be regarded as surplusage. *Id.*
18. *Streets and Alleys.—Change of Established Grade.—Failure to Assess and Tender Damages.—Recovery from City.*—Under section 3073, R. S. 1881, a city can not change the grade of a street or alley, which has once been regularly established, without first having the damages which will result to adjacent property-owners assessed and tendered, and where it fails to do this, an action may be maintained against it for the damages. *City of Lafayette v. Wortman, 404*
19. *Hawkers and Peddlers.—Power to Restrain.*—Under subdivision 23 of section 3106, R. S. 1881, which empowers cities incorporated under the general law "to restrain hawking and peddling," any mode of selling goods which does not fall within these terms can not be made unlawful by ordinance. *Grafty v. City of Rushville, 502*
20. *Same.—Definition of Hawking and Peddling.*—Any method of selling goods by outcry on the streets or public places in a city, or by attracting persons to purchase goods exposed for sale at such places by placards or signals, or by going from house to house selling or offering goods for sale at retail to individuals not dealers in such commodities, whether they be carried along for present delivery, or the sales be made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute. *Id.*
21. *Same.—Constitutional Law.—Ordinance.—Discrimination Against Citizens and Products of Other Communities.*—A city ordinance, requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which such city is situated, to procure a license and pay a fee therefor before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities, and is unconstitutional and void. *Id.*

COAL MINES.

See MINER'S LIEN.

COLLATERAL ATTACK.

See DECEDENTS' ESTATES, 8; RAILROAD, 1, 2.

COMMON CARRIER.

See NEGLIGENCE, 3 to 7; RAILROAD.

COMMON LAW.

See CRIMINAL LAW, 20, 21.

COMMON SCHOOLS.

See PLEADING, 10; SCHOOL LANDS; SCHOOLS; TOWNSHIP TRUSTEE.

CONDITION.

See CITY, 17; SCHOOLS, 2.

CONSIDERATION.

See DEED, 1; DESCENT, 3; DIVORCE, 3; HUSBAND AND WIFE, 6, 8; MORTGAGE, 3, 4; PLEDGE, 2; PROMISSORY NOTE, 1; RAILROAD, 5 to 8.

CONSTITUTIONAL LAW.

See CITY, 11, 12, 19 to 21; OFFICE AND OFFICER, 4, 5; STATUTES; TAXES, 1.

City.—Ordinance.—Discrimination Against Citizens and Products of Other Communities.—A city ordinance, requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in

which such city is situated, to procure a license and pay a fee therefor before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities, and is unconstitutional and void. *Grafty v. City of Rushville, 502*

CONTEMPT.

See INJUNCTION, 3, 4.

CONTINUANCE.

Effect of Failure to Dispose of Cause During Term.—In all judicial or quasi judicial proceedings, a cause does not lapse or abate on account of a failure to enter a continuance or make some other disposition of it at a term of the court in which it is pending, but it stands continued by operation of law. R. S. 1881, sections 1325, 1326, 1327.

Black v. Thomson, 162

CONTRACT.

See ATTORNEY AND CLIENT, 2; CITY, 11 to 17; DEED, 1; GUARANTY; HUSBAND AND WIFE, 5 to 9; INSTRUCTIONS TO JURY, 2, 3; MARRIED WOMAN; MORTGAGE; PLEADING, 10; PLEDGE; PROMISSORY NOTE; RAILROAD, 5 to 8; SCHOOLS; TOWNSHIP TRUSTEE; TURNPIKE.

1. *Receipt for Money Deposited.*—*Statute of Limitations.*—An instrument reading, "Received of Joseph S. Long sixteen hundred dollars, on deposit, in National currency. Straus Bros.," is a written contract for the payment of money, and the six years' statute of limitations does not apply to an action thereon. *Bong v. Straus, 94*

2. *Binding Upon Nation as well as Citizen.*—The Nation is as much bound by a contract as an individual citizen. *Daygett v. Bonewitz, 276*

3. *When Not Presumed Verbal.*—*Pleading.*—A contract will not be presumed to be verbal where the pleading declaring on it alleges that "a copy of said written contract is herewith filed and made a part of this answer, as Exhibit A," and where, following the answer, there is a copy of the contract. *Burrow v. Terre Haute, etc., R. R. Co., 432*

4. *Assumption of Debts of Another.*—*Action by Creditor.*—A creditor may maintain an action against one who has agreed, for a consideration, to assume and pay the debts of the debtor. *Redelsheimer v. Miller, 485*

CONTRIBUTION.

See PRINCIPAL AND SURETY; PROMISSORY NOTE, 4.

CONTRIBUTORY NEGLIGENCE.

See CITY, 1; NEGLIGENCE.

CONVERSION.

1. *Personal Property.*—*Sale.*—*Misapplication of Proceeds.*—*Liability.*—Where one takes possession of and sells personal property at the direction of the owner, but fails to properly apply or misapplies the proceeds, there is no conversion of the property, and his liability must be predicated on the misapplication or conversion of the proceeds.

Bixel v. Bixel, 534

2. *Same.*—*Complaint.*—*Evidence.*—Under a complaint charging a conversion of property merely, there can be no recovery for a misapplication or conversion of the proceeds of a sale of the property, and evidence of a conversion or misapplication of the proceeds is not admissible. *I b.*

CONVEYANCE.

See DECEDENTS' ESTATES, 2, 5, 9, 10; DEED; DESCENT, 3; PROMISSORY NOTE, 3; REAL ESTATE; SCHOOL LANDS; WITNESS, 5.

1. *Encumbrance.*—*Free Gravel Road Assessment.*—*Breach of Covenant.*—*Burden of Proof.*—A grantee, to whom land has been conveyed with a cov-

enant against encumbrances, who claims to have paid a gravel road assessment and seeks to recover the amount from the grantor, must show that such assessment was a valid and subsisting encumbrance when the deed was executed. *Kirkpatrick v. Pearce*, 520

2. *Same.*—*Evidence.*—*Gravel Road Duplicate.*—In such case, the gravel road duplicate is not sufficient evidence of the fact that an assessment was a valid and subsisting lien at the time of the conveyance, but it must be made to appear, at least, that there was a proceeding resulting in the assessment. Section 6493, R. S. 1881, does not cover a case of this kind. *Id.*

CORPORATION.

See JURISDICTION; RAILROAD; TAXES, 1 to 3; TELEGRAPH COMPANY; TURNPIKE.

1. *Summons.*—*Action in One County and Process to Another.*—*Presumption.*—Where, in an action against a corporation, the clerk of the county in which the action is brought issues a summons for the defendant to another county, it will be presumed, in the absence of any showing to the contrary, that such summons was properly issued to, and served in, such county, under section 316, R. S. 1881, because there was no person, officer or agent of the defendant in the county where the action is pending, upon whom service could lawfully be had. *Rochester, etc., R. W. Co. v. Jewell*, 338
Rochester, etc., R. W. Co. v. Miller, et al., 598, 599
2. *Private Person Can Not Maintain Suit to Question Legal Existence.*—*Quo Warranto by Prosecuting Attorney.*—*Turnpike.*—*Case Distinguished.*—Where persons in good faith act under a corporate name, and exercise the rights and franchises of a corporation authorized by law, *e. g.*, a turnpike company, they become a corporation *de facto*, and a private citizen, although claiming to be a stockholder therein, can not maintain a suit to inquire into its legal existence. Such a proceeding must be brought on behalf of the State by the proper prosecuting attorney. *Albert v. State, ex rel.*, 65 Ind. 413, distinguished and modified. *North v. State, ex rel.*, 356

COSTS.

See ABATEMENT; CHANGE OF VENUE; ELECTIONS.

COUNTY.

See CHANGE OF VENUE; COUNTY COMMISSIONERS; ELECTIONS.

COUNTY AUDITOR.

See BOND; FEES AND SALARIES; GRAVEL ROAD, 4.

COUNTY COMMISSIONERS.

See DRAINAGE, 10 to 14; ELECTIONS; GRAVEL ROAD.

1. *Pleading.*—*Practice.*—No formal pleadings are required in the presentation of a claim against a board of county commissioners. It is only necessary to file a written statement or account giving the nature of the claim, and so identifying it as to bar another proceeding upon it. *Stout v. Board, etc.*, 343
2. *Same.*—*Formal Pleadings.*—But where the parties elect to file formal pleadings and to form issues of law upon the facts contained in any of such pleadings, the sufficiency of the facts thus pleaded may be ruled upon as in other cases. *Id.*

COURTS.

See CHANGE OF VENUE; SUPREME COURT.

CRIMINAL LAW.

See APPEAL, 3; CHANGE OF VENUE; EXTRADITION; INTOXICATING LIQUOR.

1. *Decedent's Estate a Person.*—The estate of a decedent is a person in legal contemplation. *Billings v. State, 54*
2. *Same.—Forging Name of Deceased Person.*—One who forges the name of a deceased person to an instrument purporting to be a promissory note, for the purpose of defrauding his estate, is guilty of the crime of forgery. *Ib.*
3. *Same.—Plea in Abatement.—Omissions.*—Omissions or defects in a plea in abatement can not be supplied or cured by intentment. *Ib.*
4. *Same.—Trial Without Plea Erroneous.—Practice.*—The trial of a criminal case without a plea is erroneous, but the error must be presented by a motion for a new trial, and not by the assignment of errors in the Supreme Court. *Ib.*
5. *Same.—Information.—Mistake.—Motion in Arrest.*—Where the whole information, taken together, shows that the charge of the offence is preferred by the prosecuting attorney, the use, by mistake, of the word "affiant" in the body of the indictment, instead of the words "prosecuting attorney," is not a defect available on motion in arrest of judgment. *Ib.*
6. *Jury.—Reading Statutes While Considering Verdict.—Semble,* that it is not error, in a criminal case, to permit the jury to take to their room an annotated copy of the Revised Statutes, and to read therefrom, while deliberating on their verdict, the section of the Statute defining the offence for which the defendant is prosecuted, where the annotations thereto consist merely of the names of decided cases. *Mulreed v. State, 62*
7. *Supreme Court.—Conflicting Evidence.*—A judgment will not be reversed on the evidence when it is conflicting. *Wagner v. State, 71*
8. *Same.—Possession of Stolen Property.—Presumption.—Previous Good Character.*—Proof of previous good character is not sufficient to rebut the presumption of guilt which possession of stolen property raises. *Ib.*
9. *Right of Citizen to Pursue and Arrest Felon.—Murder.*—Where a pick-pocket is discovered plying his vocation in a crowd, a citizen has the right to arrest him upon fresh pursuit, without a warrant, and if the wrong-doer kills him while he is attempting to make the arrest, it is murder. *Kennedy v. State, 144*
10. *Same.—Proof of Distinct Felony.*—In such case, on the trial of the thief for murder, it is competent to prove, by either direct or circumstantial evidence, the recent commission of the robberies and the connection of the accused therewith, for the purpose of showing that the citizen was engaged in the performance of his duty when slain. *Ib.*
11. *Same.—Instruction.—Speculative Doubt.*—A speculative doubt as to the possibility of innocence is not such a doubt as requires an acquittal, and the jury may be so instructed. *Ib.*
12. *Same.—Instructions Considered Together.—Practice.*—Where all the instructions, considered together, correctly state the law, the judgment will not be reversed because one may be defective. *Ib.*
13. *Same.—Repetition of Information Not Required.*—Where the court instructs the jury as to what must be proved to constitute a felonious homicide, it is not necessary to repeat such information in subsequent instructions. *Ib.*
14. *Indictment.—Grammatical Construction.*—Where a pronoun is used in

an indictment, there is no rule of legal or grammatical construction which requires that it shall relate to the last preceding noun, for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed. *Miller v. State, 152*

15. *Instruction.—Stating Elements of Offence.*—When it is undertaken to state in an instruction all of the elements of the offence necessary to a conviction, the instruction is bad if an essential element is omitted; but where an instruction, partially stating the necessary facts, does not charge that they alone, without reference to other facts and other instructions, will justify a conviction, it is not erroneous. *Bird v. State, 154*
16. *Same.—Duty of Jury to Consider Instructions.*—It is not error to instruct the jury that if they have no well defined opinions or convictions as to what the law is relating to any matter at issue, they should give the instructions of the court a respectful consideration. *Ib.*
17. *Same.—Defendant's Testimony.—Credibility and Weight.*—Where the defendant testifies in his own behalf, an instruction that in weighing his testimony the jury should not overlook the fact that he is the defendant, and deeply interested in the result of the prosecution, and that his testimony must be consistent with all the other facts and circumstances in evidence, to have a controlling weight, is erroneous. *Ib.*
18. *Plea of Guilty.—Sentence.—Duty of Court.*—After a plea of guilty to a criminal charge by one of legal age, it is the duty of the court to either sentence him at the time or to place him in the custody of the sheriff until sentence. *Gray v. State, 177*
19. *Same.—Prosecuting Attorney.—Sustaining Prosecution.—Illegal Agreement with Defendant.*—The prosecuting attorney, after the entry of a plea of guilty, can not, with or without the consent of the court, lawfully agree with the defendant that he may depart from court without sentence, subject to rearrest and sentence if he shall commit another offence of a similar character. *Ib.*
20. *No Common Law Offences in this State.*—There are no common law offences in this State, and there can not be a conviction for any offence which is not defined by statute. Section 237, R. S. 1881. *Stephens v. State, 185*
21. *Same.—Indecent Liberties with Girl Under Twelve Years of Age.—Assault.—Consent.—Indictable Offence.—Statute Construed.*—One who merely takes indecent liberties with a girl under twelve years of age, with her consent, but upon her refusal to consent to sexual intercourse desists, is not, under existing statutes, guilty of an indictable offence, the girl having sufficient intelligence to understand the nature of his conduct. Sections 1909 and 1917, R. S. 1881, are construed. *Ib.*
22. *Murder.—Evidence.*—For evidence considered and held sufficient to sustain a conviction for murder in the first degree, see opinion. *Hudson v. State, 378*
23. *Same.—Weight and Sufficiency of Evidence.—Supreme Court.—Practice.*—Where the evidence tends to support the verdict on every material point, the Supreme Court will not reverse the judgment merely on the weight or sufficiency of the evidence. *Ib.*
24. *Permitting Minors to Play Pool.*—Where, in a prosecution for allowing minors to play pool in violation of law, the State makes a *prima facie* case, the defendant, to authorize an acquittal, must show that he acted in good faith, and under an honest and reasonable belief that the minors were of full age. *Taylor v. State, 483*
25. *Assault and Battery with Intent to Murder.—Indictment.*—An indictment

which charges, in substance, that the defendant unlawfully and feloniously, and in a rude, insolent and angry manner, with premeditated malice and with intent to kill and murder, shot a named person, is good as charging an assault and battery with such intent.

Keeling v. State, 563

26. *Same.—Conviction of One Offence Under Indictment for Another.*—A person charged with an assault and battery with intent to murder, may be convicted of an assault with intent to murder, if the evidence makes such a case. *Ib.*
27. *Same.—Conviction of Wrong Offence.—Harmless Error.*—Where the evidence makes a case of mere assault with intent, but the court finds the defendant guilty of an assault and battery with intent, as charged in the indictment, it is an error, but a harmless one, as the punishment for both offences is the same. *Ib.*
28. *Indictment.—Return.—Trial.*—Where it affirmatively appears that the indictment set out in the transcript was duly returned into court, and that the defendant appeared and pleaded thereto, it is sufficiently shown that the trial was had upon such indictment, and the fact that the indictment and cause bear different numbers is immaterial. *Mergentheim v. State, 567*
29. *Same.—Public Nuisance.—Indictment.—Duplicity.*—Where the doing of any one of a number of distinct acts is made an offence to which the same punishment is affixed, as in section 2066, R. S. 1881, relating to public nuisances, the doing of any one or more of such acts by the same person, at the same time, constitutes but a single offence, which may be charged in the same count of indictment without duplicity. *Ib.*
30. *Same.—Negating Exception in Statute.*—An indictment founded on section 2066, for creating a nuisance, need not negative the exception contained in the proviso to such section. *Ib.*
31. *Same.—Description of Locality and Business.*—Where the acts mentioned in the indictment are unlawfully done and are injurious to the property and health of others, they constitute an indictable offence, without regard to the business in which the defendants are engaged, and a description of the locality and business is not essential to the validity of the indictment. *Ib.*
32. *Same.—Evidence.—Feeling Between Witness and Defendant.*—Where a witness for the prosecution has testified concerning the state of feeling existing between himself and the defendant, evidence as to his feeling toward those of the defendant's race who reside in the community, may properly be excluded. *Ib.*
33. *Same.—Physical Condition of Thing or Locality.—Comparison.*—Where the physical condition of a thing or locality is in question, at the time a certain event happened, it is sometimes competent to show such condition at other times shortly before or after the event, and that it was in the same condition when the event occurred, but this rule does not apply, in a prosecution for maintaining a nuisance, to a comparison of odors arising therefrom covering a period of several years. *Ib.*
34. *Same.—Neglect or Act of City will not Excuse Creation of Nuisance by Citizen.*—One who is prosecuted for discharging refuse substances from his mills into a canal bed, and thereby creating a nuisance, is not excused by the fact that the city in which his mills are situate had failed to provide suitable drainage, or had previously obstructed the flow of water in the canal. *Ib.*
35. *Same.—Knowledge.—Presumption.*—Where it is shown that the owner of the mills lived in the vicinity, and that the alleged nuisance had existed for two years, it will be presumed, in the absence of any show-

- ing to the contrary, that he had such knowledge as made him responsible therefor. *Ib.*
36. *Same.*—*Number of Witnesses.*—*Limit.*—*Discretion.*—It is within the discretion of the trial court to fix a reasonable limit to the number of witnesses on a given subject. *Ib.*
37. *Same.*—*New Trial.*—*Misconduct of Juror.*—Where misconduct of jurors is alleged as a cause for a new trial, the misconduct must be shown, and not left to inference. *Ib.*
38. *Same.*—*Immaterial Variance.*—A variance in a matter of unnecessary description will not authorize a reversal. *Ib.*
39. *Affidavit and Information.*—*Variance Between, as to Date of Offence.*—*Clerical Error.*—*Uncertainty.*—*Motion to Quash.*—The affidavit charged that the offence was committed October 21st, 1885. The information charged that it was committed October 21st, 1886. The affidavit was sworn to January 16th, 1886, and both affidavit and information were filed on the latter date. *Held*, that the date as given in the information is a mere clerical error, and in the absence of a motion to quash for uncertainty, the error is not available on appeal, as it did not prejudice the substantial rights of the defendant. *Trout v. State, 578*
40. *Same.*—*Arrest of Judgment.*—A motion in arrest of judgment will not be sustained for mere defects or uncertainties in a criminal pleading. *Ib.*
41. *Plea of Former Jeopardy.*—*What Must be Shown.*—In pleading a former jeopardy it is not sufficient to show that a jeopardy once attached to the defendant, but it must also be shown that it was not waived by him by any act, or discharged by operation of law. *Hensley v. State, 587*
42. *Same.*—*Nolle Prosequi to Count of Indictment During Trial.*—*Former Jeopardy.*—Where a plea of former jeopardy shows that during the first trial the State was permitted, over defendant's objection, to dismiss as to one count in the indictment, and that the trial proceeded on another count, which was substantially the same as the indictment to which the plea is addressed, but the plea fails to show the result of such trial, it is bad. The inference in such case is that there was no final judgment on the count on which the trial was had, in which event another trial thereon, or on a new indictment embracing the same facts, is proper. *Ib.*
43. *Indictment.*—*Impossible Date.*—*Motion to Quash.*—An indictment which charges the commission of the offence upon an impossible date is bad on a motion to quash. *Murphy v. State, 598, 600*

CURATIVE STATUTE.

See BOND; INJUNCTION, 1; STATUTE, 1 to 6.

DAMAGES.

See CITY, 1 to 10, 18; HUSBAND AND WIFE, 1 to 4; JURISDICTION; NEGLIGENCE; PRACTICE, 7; RAILROAD, 2, 7, 4 to 20; REPLEVIN; WITNESS, 4.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGE; CONTRACT, 4; GUARANTY.

DECEDENTS' ESTATES.

See PRINCIPAL AND SURETY; REAL ESTATE, ACTION TO RECOVER, 2; WILL

1. *Decedent's Estate a Person.*—The estate of a decedent is a person in legal contemplation. *Billings v. State, 54*
2. *Fraudulent Conveyance.*—*Statute of Limitations.*—*Pleading.*—A com-

plaint by an administrator to set aside a fraudulent conveyance made by his intestate, which shows on its face that at the time it was filed the latter had been dead more than five years, is bad on demurrer. Section 2334, R. S. 1881. *Cook v. Chambers*, 67

3. *Widow's Interest in Real Estate.—Parties to Action.—Practice.*—Under our present law, the court can in no case, for the purpose of paying debts against the estate of a decedent, order the sale of the portion of the real estate which the widow owns by reason of her marital rights, whether she is made a party to the proceeding or not. *Hutchinson v. Lemcke*, 121
4. *Same.—Tenancy by Entireties.—Widow's Interest Prior to Statute of 1852.—Judgment.—Conclusiveness of.*—Prior to the taking effect of the statute of 1852, the widow took only a dower interest in the real estate of her husband, and the probate court had power to order the entire fee sold for the payment of debts; and when the widow claimed to be the absolute owner of real estate by reason of a tenancy by entireties, and being made a party to a petition by her husband's administrator to sell such real estate, for the payment of the debts of his estate, failed to appear, and permitted such order to be made, she is bound by such proceedings, and can not afterwards assert title. *Ib.*
5. *Statute of Limitations.—Administrator's Sale of Real Estate.*—Although an administrator's deed to real estate is prematurely made, the title of the purchaser is protected by the five years' statute of limitations, where the party injuriously affected is not under disability. *Ib.*
6. *Will.—Widow's Statutory Right to Five Hundred Dollars.—Relinquishment.—Election.—Cases Criticised.*—The claim of the widow of a decedent to the five hundred dollars for which provision is made by section 2269, R. S. 1881, may be released and relinquished by her election to take under an inconsistent testamentary provision. *Nelson v. Wilson*, 61 Ind. 255, and *Whiteman v. Swem*, 71 Ind. 530, criticised. *Langley v. Mayhew*, 198
7. *Practice.—Jurisdiction.—Docketing Probate Cause as Civil Action Not Available Error.*—The docketing and trial as an ordinary civil action of a matter which belongs to the probate jurisdiction of the circuit court, is merely an irregularity, and not an available error. *Ib.*
8. *Erroneous Order Vesting Entire Estate in Widow.—When Conclusive.—Collateral Attack.*—An order of the common pleas court, having jurisdiction, vesting the entire estate of a deceased husband in his widow absolutely, instead of in her in trust for minor children, as required by the statute in force at the time (1 R. S. 1876, p. 411, section 19), while erroneous, was not void, and it will stand as against a collateral attack. *Spencer v. McGonagle*, 410
9. *Widow's Interest.—Sale of Whole Estate to Pay Husband's Debts.—When Binding on Heirs.*—While the widow's interest can not be sold to pay the debts of her deceased husband, on the petition of the latter's administrator, yet, if she be dead and her heirs are made parties to the petition, a sale of the whole, under an order of the court, will deprive them of title. *Bumb v. Gard*, 575
10. *Same.—Receipt by Heir of Purchase-Money.—Estoppel.*—Where an heir, having full knowledge that the whole estate in the land has been sold on petition of the administrator, receives and retains the purchase-money remaining after the payment of debts, he can not avoid the sale. *Elliott v. Frakes*, 71 Ind. 412, distinguished. *Ib.*

DEDICATION.

See EVIDENCE, 10.

DEED.

See CONVEYANCE; DECEDENTS' ESTATES, 5; EVIDENCE, 2, 9; PROMISSORY NOTE, 3; QUIETING TITLE, 4; REAL ESTATE; SHERIFF'S SALE, 8.

1. *Consideration.*—*Parol Evidence of—Agreement of Grantee to Pay Encumbrance.*—Where the consideration of a deed is stated in general terms, the true consideration may be shown by parol, and for this purpose it may be shown that the grantee verbally agreed, as a part of the consideration, to pay an existing encumbrance. *Hays v. Peck, 383*
2. *Description.*—It is not the office of a description to identify the land conveyed, but to furnish means of identification.
Burrow v. Terre Haute, etc., R. R. Co., 432
3. *Acknowledgment.*—An acknowledgment is necessary to entitle a deed to go upon record, but is not essential to give it effect as between the parties.
Beaver v. North, 544

DEPOSIT.

See CONTRACT, 1.

DESCENT.

See PARTITION, 2.

1. *Childless Second Wife.*—*Rights of Children of Husband by First Marriage.*—Where a husband dies without living issue by a second wife, who survives him, but with living children by a former wife, the land which descends to such second wife at her death descends to his children by the first marriage.
Thorp v. Hanes, 324
2. *Same.*—Under the statute, a widow, who is a childless second or subsequent wife, takes one-third of her deceased husband's real estate in fee simple, with the descent cast by law, and during her life his children by a former marriage have no title to such one-third, but they acquire title by descent from her. *Id.*
3. *Partition.*—*Sale by Commissioner.*—*Purchase by Widow.*—*Subsequent Marriage.*—*Conveyance to Second Husband.*—*Consideration.*—A widow who purchases at commissioner's sale, under partition proceedings, land of which her husband died seized, takes by purchase, and not by descent; and where, after a second marriage, she conveys to a third person who conveys to her husband, no consideration being paid, and he dies seized of the land, it will go to his heirs, and not to the heirs of the first husband.
Spencer v. McGonagle, 410
4. *Widow Taking Whole of Husband's Land.*—*Action for Possession.*—*Evidence.*—*Burden of Proof.*—Under section 2490, R. S. 1881, a widow who is entitled to all the real estate of which her husband died the owner, in case he left no surviving child or father or mother, must, in an action by her for possession, prove that there are no such survivors.
Daugherty v. Deardorf, 527

DESCRIPTION.

See DEED, 2; RAILROAD, 6; REAL ESTATE, 5, 6; SHERIFF'S SALE, 10, 11.

DISCRETION.

See CHANGE OF VENUE, 2; CRIMINAL LAW, 36; DIVORCE, 2; EVIDENCE, 7; GRAVEL ROAD, 1, 2; PLEADING, 21; STATUTE, 3; WITNESS, 1.

DIVORCE.

1. *Interrogatories to Party not Proper.*—*Case Followed.*—Interrogatories to the parties are not proper in an action for a divorce. *Barr v. Barr, 31 Ind. 240, followed.*
Simons v. Simons, 197
2. *Same.*—*Alimony.*—*Discretion of Trial Court.*—It is only where there is an abuse of discretion that the Supreme Court will review the decision of the trial court as to the amount of alimony. *Id.*

3. *Alimony.—Previous Settlement of Property Upon Wife.—Revocation.—Evidence.*—Where a husband has settled property upon his wife, and she subsequently applies for a divorce on the ground of his misconduct, but does not insist on alimony, he is not entitled to show the value of the property and the consideration of the settlement, nor, in the event a divorce is granted his wife, can he obtain a revocation.

Stultz v. Stultz, 400

DOMESTIC RELATIONS.

See DIVORCE; GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIED WOMAN.

DRAINAGE.

See BOND.

1. *Remonstrance.—Burden of Issue.*—A land-owner, who remonstrates on the single ground that his land is assessed for too much, has the burden of the issue. *Conwell v. Tute, 171*
2. *Ditch Extending into Two Counties.—Jurisdiction.*—Where a ditch extends into or through two counties, proceedings to establish it may be prosecuted in either. *Updegraff v. Palmer, 181*
3. *Same.—Notice.—Law of 1881.*—Where a drainage proceeding was commenced under the law of 1881, it was proper to give notice of the time of filing the petition. *Ib.*
4. *Same.—Appearance.—Remonstrance.—Practice.*—Where parties appear and remonstrate, they will be confined to the grounds of objection stated in their remonstrance. *Ib.*
5. *Same.—Notice.—Assumption of Jurisdiction.*—The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient. *Ib.*
6. *Same.—Reference to Commissioners.—Objections to, When too Late.*—After the drainage commissioners have made their report, and an order is entered approving it and establishing the ditch, it is too late to object to the reference to such commissioners. *Ib.*
7. *Same.—Affidavit.—Notary Public.—Jurat.—Omission of Month.*—A petition for drainage may be sworn to before a notary public, and the mere omission of the month from the jurat will not render the verification bad. *Ib.*
8. *Same.—Filing of Petition.—Conclusiveness of Judgment.*—A judgment entered upon a petition for drainage is conclusive that the petition was duly filed. *Ib.*
9. *Same.—Dismissal of Petition.*—The fact that the report of the commissioners is invalid, or that the orders of the court based thereon are erroneous, will not supply grounds for dismissing the petition. *Ib.*
10. *Act of March 9th, 1875.—Repeal.*—The drainage act of March 9th, 1875, was not repealed by the act of March 13th, 1879, and one petitioning for drainage in 1880 had the option of proceeding under either act. *Hardy v. McKinney, 364*
11. *Same.—Appeal from Board of Commissioners.—Trial.*—Under the statute, section 5777, R. S. 1881, appeals from the board of commissioners stand for trial *de novo* in the circuit court. Such appeals suspend all the proceedings had upon questions in issue before the commissioners, and they can not either be used or taken into consideration upon the trial in the circuit court. *Ib.*
12. *Same.—Finding and Judgment in Circuit Court.—What Required.*—In appeals to the circuit court in drainage and analogous proceedings, the court or jury trying the same succeed to all the substantial duties of the viewers and reviewers, and the finding or verdict should be suffi-

ciently specific upon every question involved to authorize a judgment finally determining all the matters in controversy. *Ib.*

13. *Same.—Remanding Cause to Commissioners.*—For a judgment remanding a cause to the board of commissioners held not sufficient as "an order how to proceed" within the meaning of section 5778, R. S. 1881, see opinion. *Ib.*
14. *Same.—Establishment of New on Line of Old Ditch.—Second Assessment.*—Where it is sought to establish a ditch upon the line of one previously constructed, and for which the persons affected by the proposed new ditch had been assessed, such facts may be shown in behalf of the remonstrators. *Ib.*

EJECTMENT.

See REAL ESTATE, 1, 2; REAL ESTATE, ACTION TO RECOVER.

ELECTIONS.

See OFFICE AND OFFICER, 3 to 8.

Expenses of Township Elections Must be Paid by County.—Under existing statutes, the necessary expenses of township as well as general elections must be borne by the county and paid by the board of commissioners out of county funds. *Board, etc., v. Center Tp., 584*

EQUITY.

See INJUNCTION; SUPREME COURT, 2.

What One Seeking Equitable Relief Must Show.—One who seeks equitable relief must show that he has done, or offered to do, in the premises, all that equity requires of him. *Jones v. Ewing, 315*

ESTOPPEL.

See ATTORNEY AND CLIENT, 2; DECEDENTS' ESTATES, 10; EVIDENCE, 8; TELEGRAPH COMPANY, 2.

EVIDENCE.

See APPEAL, 1; ATTORNEY AND CLIENT; BILL OF EXCEPTIONS; CITY, 8 to 10, 16; CONVERSION, 2; CONVEYANCE; CRIMINAL LAW, 7, 8, 10, 17, 22 to 24, 32, 33, 35, 36; DEED, 1, 2; DESCENT, 4; DIVORCE, 3; FEES AND SALARIES, 1; INSTRUCTIONS TO JURY, 1, 2; INTERROGATORIES TO JURY, 5; INTOXICATING LIQUOR, 2, 3; NEW TRIAL, 2, 4, 5; PLEADING, 3, 14; PRACTICE, 1, 2, 6, 8, 10; PROMISSORY NOTE, 1; SUPREME COURT, 4; WITNESS.

1. *Admission of Incompetent Parol Evidence Without Objection.*—Where parol evidence is admitted without objection, it will sustain a finding, although it would have been held incompetent, as not the best available evidence, if objection had been made. *Judd v. Small, 398*
2. *Title to Real Estate.—Deed.*—Where title by deed is relied on, a chain of title must be traced back to the ultimate source of title or to a grantor in possession under a claim of title at the time he executed his deed. *City of Lafayette v. Wortman, 404*
3. *Same.—Idem Sonans.—Presumption.*—The names *Wortman* and *Workman* are not *idem sonans*, and the court will not assume, in the absence of proof, that they refer to the same person. *Ib.*
4. *Preponderance.—Reasonable Probability of Truth.—Duty of Jury.*—It is the duty of the jury, in a civil case, to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. *Louisville, etc., R. W. Co. v. Thompson, 411*
5. *Record of Justice of Peace.*—The record of a justice of the peace is competent evidence of the proceedings had in a suit before him. *Redelsheimer v. Miller, 485*

6. *Lost Letter.—Proof of Contents.*—Where a letter is shown with reasonable certainty to be relevant and material to the issues in a cause, its contents may be proved by parol, after proof of loss by a fair preponderance of the evidence. *McComas v. Haas, 512*
7. *Order of Admission.—Discretion of Trial Court.—Practice.*—The order of admission of evidence is very much within the discretion of the trial court, and a clear abuse must be shown to justify a reversal of the judgment. *Western U. Tel. Co. v. Buskirk, 549*
8. *Survey.—Appeal from Survey Fixing Boundary Lines.—Parol Evidence.*—On an appeal from a survey fixing boundary lines, made by the county surveyor or the surveyor appointed by the court, parol evidence may be heard for the purpose of ascertaining the true lines, however acquired. *Cleveland v. Obenchain, 591*
9. *Decree Construing Deed.*—A decree which construes a deed forming one of the links in a party's title, is competent evidence, even though it may not be conclusive as against strangers. *Ib.*
10. *Highway.—User.—Dedication.*—It is competent to prove the length of time a road has been laid out and used by the public, as user under color or claim of right will establish a dedication. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES.

EXEMPTION.

See INJUNCTION, 2.

EXHIBIT.

See CONTRACT, 3; MORTGAGE, 1; PLEADING, 6, 8, 11; QUIETING TITLE, 4.

EXPERT.

See WITNESS, 1 to 3.

EXTRADITION.

1. *Surrender of One Brought by Requisition from Another State.—Escape.*—Where one commits a felony in Michigan, and voluntarily comes into this State and is arrested for a felony committed here, and while in custody a warrant for his arrest, issued on a requisition from Michigan, is received by the officer detaining him, but the accused, escaping from custody, flees to Ohio, from which State he is returned to Indiana upon requisition, he may, upon the failure of the prosecution against him in this State, be surrendered to the authorities of Michigan on the requisition from that State. *Hackney v. Welsh, 253*
2. *Same.—Good Faith of Public Officers.—Presumption.*—The presumption is that public officers discharge their duties in good faith, and the mere fact that the accused was kept in custody for more than a year, when a *nolle prosequi* was entered to the charge preferred against him in this State, does not show bad faith. *Ib.*
3. *Same.—Good Faith not Affected by Knowledge or Expectation of Sheriff.—Prosecuting Attorney.*—The good faith of extradition proceedings is not affected by the knowledge or expectation of reward of the sheriff, as the State is not represented by that officer but by the prosecuting attorney. *Ib.*
4. *Same.—Authentication.—Governor's Certificate.*—The Governor is not required to certify that an information and other papers accompanying a requisition are genuine; it is sufficient if he certifies that they are duly authenticated. *Ib.*
5. *Same.—Affidavit.—Signature of Prosecuting Attorney.*—An authentication by affidavit and by the signature of the prosecuting attorney is sufficient. *Ib.*

FEES AND SALARIES.

1. *Statute.—Construction.—Fees and Salaries.—Public Sentiment.—Judicial Notice of.*—It is an historical fact, of which the courts will take judicial notice, that when the Legislature of 1879 met, and for several years previously, there was a strong public sentiment in favor of the reduction of the fees and salaries of public officers, which constituted an important factor in the preceding general election, and this circumstance may be considered in ascertaining the legislative intent in the enactment of the statute of that year on the subject of fees and salaries. *Stout v. Board, etc., 543*
2. *Same.—Act of 1879.—Compensation of County Auditor.—Cases Adhered to.—Stare Decisis.*—Under section 22 of the act of March 31st, 1879 (R. S. 1881, section 5907), concerning fees and salaries, a county auditor, in addition to his fixed salary, is entitled to \$125 per year for each one thousand inhabitants of his county over fifteen thousand and not more than twenty thousand, and \$100 for each one thousand inhabitants in excess of twenty thousand, and not to \$225 per year for each one thousand inhabitants in excess of twenty thousand. *Edger v. Board, etc., 70 Ind. 331, and Parker v. Board, etc., 84 Ind. 340, are adhered to and the doctrine of stare decisis applied. Ib.*

FORECLOSURE.

See CHATTEL MORTGAGE; HUSBAND AND WIFE, 6 to 9; MORTGAGE.

FORGERY.

See CRIMINAL LAW, 2.

FRAUD.

See CHATTEL MORTGAGE; CITY, 17; DECEDENTS' ESTATES, 2; GUARDIAN AND WARD, 2, 5 to 7; RAILROAD, 9 to 11.

FRAUDULENT CONVEYANCE.

See DECEDENTS' ESTATES, 2.

GIFT.

See WITNESS, 5.

GRAVEL ROAD.

See CONVEYANCE; INJUNCTION, 1; STATUTE, 5; TURNPIKE.

1. *County Commissioners.—Changing Time of Meeting of Viewers and Engineer.—Discretion.*—In a proceeding to establish and construct a gravel road, the board of commissioners have discretionary authority to change or extend the time fixed for the meeting of the viewers and engineer. *Black v. Thomson, 162*
2. *Same.*—Where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time, in the exercise of a reasonable discretion. *Ib.*
3. *Same.—Appeal from Board.—Irregularities in Proceedings not Ground for Dismissal in Circuit Court.*—Where, in a proceeding to establish a gravel road, the board of commissioners properly acquired jurisdiction, mere irregularities in the subsequent proceedings of the board will afford no ground for dismissing the cause on appeal to the circuit court, where the cause stands for trial *de novo*. *Ib.*
4. *Free.—Lien of Assessment.—When it Attaches.*—Under sections 5095-5097, R. S. 1881, the lien of an assessment for the construction of a free gravel road attaches as of the day of the final order of the county board confirming the report of the committee appointed to apportion the expenses of construction, and it is unaffected, except as to the

amount, by any reductions or additions made by the county auditor under section 5096. *Kirkpatrick v. Pearce, 520*

GUARANTY.

1. *Bond.*—*Contract.*—A bond stipulating that the principal shall perform certain specified things, and that it shall be a continuing guaranty until after notice, is a contract of guaranty. *Weed S. M. Co. v. Winchel, 260*
2. *Same.*—*Contract of Agency.*—*Bond for Performance.*—*Construction.*—Where a contract of agency and a bond given by the agent to secure its performance are executed concurrently, they must be construed together. *Ib.*
3. *Same.*—*Liability of Sureties.*—The sureties in the bond are not liable for transactions of the agent beyond the scope of his contract, or for failures which do not relate to some duty imposed thereby. *Ib.*
4. *Same.*—*Principal and Agent.*—Where the contract is that the principal shall consign to the agent machines to be sold or leased by him, as the former's property, the sureties in the bond are not liable for sales made to the agent. *Ib.*
5. *Same.*—*New Contract with Agent.*—*Merger.*—*Release of Guarantors.*—Where, after breach of a contract, the performance of which is guaranteed, the creditor and debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and on terms different from those imposed by the original agreement, the old contract is presumptively merged, and the guarantors discharged from liability. *Ib.*

GUARDIAN AND WARD.

1. *Degree of Care Required of Guardian.*—A guardian is only required to exercise that degree of care and prudence in managing the money of his ward, which an ordinarily prudent man employs in his own affairs. *Sauter v. Favorite, 291*
2. *Same.*—*Investment.*—*Mortgage.*—*Liability for Loss.*—*Fraud.*—Where a guardian acts in good faith and with reasonable diligence in taking a mortgage, believing it to be a senior lien, as security for a loan of his ward's money, he can not be held liable for a loss solely on the ground that such mortgage was made a junior one by the fraud of the mortgagor. *Ib.*
3. *Same.*—*Relying on Statements of Borrower.*—*Negligence.*—Ten days before loaning money of his ward, a guardian examined the records and found the land offered as a security to be free from encumbrances. The borrower owned property worth many thousand dollars more than the amount of the loan. He was a business man of excellent credit and standing, and it was not known that he was in debt. At the time the mortgage was executed, the borrower told the guardian that the land was unencumbered, but he had in fact in the meantime mortgaged it to a third person. *Held*, that the guardian was not guilty of negligence in relying upon the statement of the borrower. *Ib.*
4. *Same.*—*Taking Mortgage Executed by Husband Alone.*—*Measure of Damages.*—*Burden of Proof.*—Where a guardian accepts a mortgage executed by the husband alone, the burden is on him to show that the husband's estate in the land is an adequate security for the money loaned; and if such fact be not shown, he will be deemed negligent in not requiring the wife to join in the execution of the mortgage, and held liable for the resulting loss, i. e., the value of the wife's interest in the land. *Ib.*
5. *Same.*—*Final Report.*—*Representations.*—*Concealment.*—*Fraud.*—A guar-

dian who, in making his final settlement report on resignation of his trust, represents that an uncollected note, taken for a loan of his ward's money, is of its full face value, concealing the fact that the maker has become insolvent, is guilty of fraud. *Ib.*

6. *Same.—Taking Note in Individual Name.*—The fact that a guardian has taken a note for his ward's money in his individual name, without any designation of his official character, may be considered, with other facts, in support of a finding of fraud. *Ib.*
7. *Same.—Special Finding.—Absence of Epithets.—Practice.*—Where the facts specially found enable the court to pronounce the proper judgment, the absence of the epithets "fraud" and "negligence" is immaterial. *Ib.*

HARMLESS ERROR.

See CRIMINAL LAW, 27; INSTRUCTIONS TO JURY, 6, 10; PRACTICE, 9, 10.

HAWKERS AND PEDDLERS.

See CITY, 19 to 21:

HEIRS.

See DECEDENTS' ESTATES; DESCENT; WILL; WITNESS, 5.

HIGHWAY.

See EVIDENCE, 10; GRAVEL ROAD; REAL ESTATE, 6, 6; TURNPIKE.

HUSBAND AND WIFE.

See DESCENT; DIVORCE; GUARDIAN AND WARD, 4; MARRIED WOMAN; REAL ESTATE, 3, 4; SHERIFF'S SALE, 1 to 6.

1. *Action for Personal Injuries to Wife.—Parties.—Pleading.*—In an action to recover damages for personal injuries to the wife, the husband is a proper but not a necessary party. *Ohio, etc., R. W. Co. v. Cosby, 32.*
2. *Same.*—While the husband is presumptively entitled to maintain a separate action to recover for medical attendance, loss of service and of the society of the wife, he can not recover for these in an action in which the wife is suing for injuries to her person, nor can such damages be recovered by them jointly. *Ib.*
3. *Same.—Measure of Damages.*—In an action by a married woman to recover damages for personal injuries, she is entitled to nothing for medical attendance, or loss of time, unless special circumstances rebutting the presumptive right of the husband to recover therefor are averred and proved. *Ib.*
4. *Same.—Instruction to Jury.*—In such an action, an instruction "that in order to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of," correctly states the law. *Ib.*
5. *Executory Contracts of Wife.—Real Estate.*—Under sections 5117 and 5119, R. S. 1881, a married woman can not convey or mortgage her real estate, nor enter into any executory contract to do so, unless her husband joins therein, nor can she enter into any contract of suretyship; but, except as thus prohibited, she has the same power to make executory contracts, and is as much bound thereby, as if she were unmarried. *McLead v. Aetna Life Ins. Co., 394.*
6. *Same.—Mortgage.—Foreclosure.—Consideration.—Complaint.*—Where it does not appear from the complaint to foreclose a mortgage against a husband and wife, that the mortgaged real estate is the separate property of the wife, or that she is the surety of her husband, such complaint is good without an averment that she received the considera-

tion, or a part of it, of the notes and mortgage, either in person or in benefit to her estate. *Ib.*

7. *Same.—Mortgage of Land Held by Entireties.—Validity.—Suretyship.*—A mortgage executed by a husband and wife on land held by them as tenants by the entirety, if it is for the benefit of the common property, or to secure the individual debt of the wife, is valid and binding on both. It is only where it is given to secure the husband's debt—the wife being prohibited from entering into a contract of suretyship by section 5119—that it is void. *Ib.*
8. *Tenants by Entireties.—Mortgage.—When Binding Upon Wife.*—A mortgage executed by a husband and wife, both being principals therein, upon land owned by them as tenants by entireties, as security for a loan of money which is used to pay off valid liens existing on the mortgaged premises, is binding upon both mortgagors. *Fawcner v. Scottish Am. Mortgage Co., 555*
9. *Same.—Contract of Wife.—Personal Judgment.*—Any contract which a married woman may lawfully execute, may be enforced against her by the personal judgment of a court of competent jurisdiction. *Ib.*

IDEM SONANS.

See EVIDENCE, 3.

INDICTMENT.

See APPEAL, 3; CRIMINAL LAW, 14, 25 to 31, 42, 43.

INFANT.

See GUARDIAN AND WARD.

INFORMATION.

See CRIMINAL LAW, 5, 39.

INJUNCTION.

See CHATTEL MORTGAGE, 2.

1. *Free Gravel Road.—Assessment.—Curative Statute.*—In an action by F. to enjoin the collection of an assessment made in a proceeding for the establishment of a free gravel road, the Supreme Court held that the action of the board of commissioners in such establishment and all subsequent proceedings in the matter were void. Subsequently, a valid curative statute was enacted, legalizing all such proceedings of the board, and all assessments made under the same. After the taking effect of this statute, J., who was not a party to F.'s action, attempted by injunction to escape the payment of assessments made against his land in such proceeding. *Held*, that J. is bound by the law as it stood when he commenced his action, and that he is not entitled to the relief prayed. *Johnson v. Board, etc., 15; Ellingham v. Board, etc., 600*
2. *Attachment in Another State.—Evasion of Exemption Laws.*—Injunction will lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident, in the courts of another State, in violation of section 2162, R. S. 1881, which makes it an offence to send a claim against a debtor out of the State for collection, in order to evade the exemption laws. *Wilson v. Joseph, 490*
3. *Contempt.—Jurisdiction of Special Judge.*—A special judge, appointed to hear and determine a particular case, has jurisdiction to punish a party for a violation of a restraining order previously granted by the regular judge. *Mowrer v. State, 539*
4. *Same.—Interference with Status of Personal Property.—When no Contempt.*—Where, during the pendency of an action respecting the ownership and custody of a piano, "the defendant and all other persons" are

enjoined from removing it from the defendant's house, where it is situated, but the defendant, before the action is determined, and without reporting his intention to the court, rents his house and moves to another State, leaving the piano in the house, but making no arrangement for its storage, the plaintiff may remove the instrument to his own house for safe-keeping without being guilty of contempt. *Id.*

INSTRUCTIONS TO JURY.

See CITY, 15, 16; CRIMINAL LAW, 11 to 13, 15 to 17; HUSBAND AND WIFE, 4; NEGLIGENCE, 6.

1. *Evidence.—Oral Admissions.*—An instruction that oral admissions of a party should be received with great caution, because a witness may not have correctly understood them, or may not have correctly recollected and repeated them, is erroneous. *Zenor v. Johnson, 69*
2. *Same.—Construction of Written Contracts.*—The court must construe all written contracts, and not leave the question of construction to the jury, except in cases where parol evidence is necessary to make a contract intelligible. *Id.*
3. *Same.—Mistake.*—It is only a mutual mistake of fact, and not a mistake of law, that will avoid a contract, and it is error to instruct the jury in general terms that a mistake will have that effect. *Id.*
4. *Practice.*—In determining whether an instruction is erroneous, it will be considered in connection with the others given. *Atkinson v. Dailey, 117*
5. *Same.*—It is not error to refuse to give instructions asked by a party when the subjects embraced in them are covered by the instructions already given. *Id.*
6. *Same.—Harmless Error.*—An erroneous instruction, if harmless, is not available for the reversal of a judgment. *Id.*
7. *Practice.—Instructions Asked Must be Signed.*—There is no available error in the refusal of the court to give instructions asked, where the same are not signed by the party or his counsel. *Hutchinson v. Lemeke, 121*
8. *Making Part of Record Without Bill of Exceptions.—Practice.*—In order that instructions may be a part of the record without a bill of exceptions, they must be filed as required by section 533, R. S. 1881, and the record must affirmatively show that they were so filed. *Blount v. Rick, 238*
9. *Refusal to Give Instruction Asked.*—It is not error to refuse to give an instruction asked, where those given by the court sufficiently cover the subject embraced therein. *Nat'l Benefit Ass'n v. Grauman, 288*
10. *When Erroneous Instruction not Available for Reversal of Judgment.*—A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that the instruction complained of was not influential in inducing the verdict. *Wooley v. Louisville, etc., R. W. Co., 381*
11. *Will be Considered as a Whole.—Reversal of Judgment.*—If the instructions, considered as a whole, put the case fairly before the jury, the judgment will not be reversed because one, taken alone, may not be sufficiently full. *Town of Rushville v. Adams, 475*
12. *Defective.—When Deemed Cured.*—Where an instruction states the law correctly, as far as it goes, but is incomplete, it may be completed by another which supplies the defect. *Western U. Tel. Co. v. Bushirk, 549*

INSURANCE.

See LIFE INSURANCE.

INTERROGATORIES TO JURY.

See INSTRUCTIONS TO JURY, 10.

1. *Submission.—Practice.*—The prayer for the submission of interrogatories to the jury is not a proper one unless the court is also asked to instruct the jury to answer them in the event that they return a general verdict. *Louisville, etc., R. W. Co. v. Worley, 320*
2. *Same.—Trial Court May Revise, or Propound Interrogatories of its Own.*—It is proper for the trial court to revise interrogatories submitted by the parties and to prepare and propound for itself interrogatories to the jury. *Ib.*
3. *Same.—Questions of Law Improper.*—An interrogatory which asks the jury to decide a question of law is improper. *Ib.*
4. *Same.—Railroad.—Animals.—Fencing Track.*—An interrogatory reading, "Could the defendant have lawfully fenced its track at the point" where animals entered upon it, is a question of law. *Ib.*
5. *Answer When there is no Evidence.*—If there is no evidence upon a point covered by a special interrogatory propounded to the jury, they may so answer. *Louisville, etc., R. W. Co. v. Thompson, 442*
6. *Same.—Motion to Make Specific.—Venire de Novo.*—The truth or falsity of answers to interrogatories is not presented by a motion to compel the jury to make them more specific, nor by a motion for a *venire de novo*. *Ib.*

INTERROGATORIES TO PARTY.

See DIVORCE, 1.

INTOXICATING LIQUOR.

1. *Sale to Minor.—Due Care.*—To relieve one from the penalty provided by the statute for selling intoxicating liquor to a minor, it is not enough that the seller believed in good faith from appearances that the minor was of legal age, but it must also be shown that the former used due care to ascertain his age. *Mulreed v. State, 62*
2. *Same.—Sufficiency of Evidence.*—For evidence held sufficient to sustain a conviction for selling intoxicating liquor to a minor, without exercising proper caution, notwithstanding the latter was apparently of legal age, see opinion. *Ib.*
3. *Sale to Habitual Drunkard After Notice.—Evidence.*—In a prosecution, under section 2093, R. S. 1881, for selling liquor to a person in the habit of being intoxicated after notice given, where there is no evidence showing that the person named in the affidavit and information was in the habit of being intoxicated, and where there is no evidence that the defendant, either in person or by agent, sold such liquor, a conviction can not be sustained. *Miller v. State, 152*

JEOPARDY.

See CRIMINAL LAW, 41, 42.

JUDGMENT.

See APPEAL; CHANGE OF VENUE, 3; DECEDENTS' ESTATES, 4, 8; DRAINAGE, 8, 12, 13; EVIDENCE, 9; HUSBAND AND WIFE, 9; MORTGAGE, 1, 2, 6 to 8; PARTITION; PRACTICE, 3; RAILROAD, 1, 17; REAL ESTATE, 1, 2; REMEDIES, 1; REPLEVIN, 1; SPECIAL FINDING; SUPREME COURT, 5, 9, 10.

Review of.—New Trial as of Right.—Pleading.—Copy of Judgment.—A complaint to review a judgment for error in setting aside an order granting a new trial as of right, and reinstating the original judgment, should set out a copy of such original judgment.

Bradford v. School Town of Marion, 280

JUDICIAL KNOWLEDGE.

See FEES AND SALARIES, 1; STATUTE, 11; TAXES, 2.

JUDICIAL SALE.

See DECEDENTS' ESTATES, 3 to 5, 9, 10; DESCENT, 3; PRINCIPAL AND SURETY, 3; RAILROAD, 16, 17; SHERIFF'S SALE.

JURISDICTION.

See CORPORATION, 1; DECEDENTS' ESTATES, 7, 8; DRAINAGE, 2, 5; GRAVEL ROAD, 3; INJUNCTION, 2, 3; STATUTE, 2; SUPREME COURT, 7.

Railroad.—Negligence.—Escaping Fire.—Injury to Real Estate.—An action against a railroad company to recover for an injury to fences and growing pasture, caused by fire from a locomotive, is an action for an injury to real estate within section 307, R. S. 1881, and is properly brought in the county where the real estate is situate, notwithstanding the defendant has no agent or office for the transaction of business in such county, and the joining of a claim for damage to personal property will not oust the jurisdiction. *Indiana, etc., R. W. Co. v. Foster, 430*

JURY.

See ATTORNEY AND CLIENT, 1; CRIMINAL LAW, 6, 16, 37; EVIDENCE, 4; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; PRINCIPAL AND SURETY, 1.

JUSTICE OF PEACE.

See EVIDENCE, 5; OFFICE AND OFFICER, 4 to 8.

LEASE.

See MINER'S LIEN.

LIBEL.

See SLANDER.

LICENSE.

See CITY, 19 to 21; RAILROAD, 8.

LIEN.

See CHATTEL MORTGAGE; CHURCH PROPERTY; CONVEYANCE; DEED, 1; DRAINAGE; GRAVEL ROAD, 4; INJUNCTION, 1; MINER'S LIEN; MORTGAGE; PLEDGE; QUIETING TITLE, 3; SHERIFF'S SALE, 3, 4, 7 to 9; STREET; TAXES.

LIFE INSURANCE.

1. *Benefit Association.—Notice and Proof of Death.—Pleading.*—Where a complaint to recover a death benefit does not explicitly aver notice and proof of the kind required by the certificate, but the facts pleaded are such that the inference necessarily arises that such notice and proof were furnished, the complaint is not bad.

Nat'l Benefit Ass'n v. Grauman, 288

2. *Same.—Limitation of Risk to Death Caused by Injury.—Complaint.*—Where the risk is limited to a case of death proximately caused by physical injuries of which there shall be some visible external sign, the complaint must make such a case; but the fact that the injury produced apoplexy does not render it any less the cause of death. *Ib.*
3. *Same.—Statements in Application.—Warranties.—Burden of Proof.*—The burden is on the insurer to prove the untruth of the statements made by the deceased in his application. *Ib.*

LIMITATION OF ACTIONS.

See CONTRACT, 1; DECEDENTS' ESTATES, 2, 5; SHERIFF'S SALE, 9 to 11.

MARION SUPERIOR COURT.

See SUPREME COURT, 8.

MARRIAGE SETTLEMENT.

See DIVORCE, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE; REAL ESTATE, 3, 4; SHERIFF'S SALE, 1 to 6.

Contract of Suretyship.—Husband and Wife.—Purchase by, of Undivided Interest in Real Estate.—Mortgage.—Promissory Note.—With full knowledge of her financial resources, E. sold to a married woman a certain undivided part of real estate, receiving payment therefor in cash. At the same time he sold to her husband the remainder of such real estate, payment to be made in installments, and executed a conveyance of the whole to the wife. The husband executed notes for the interest purchased by him, and, at E.'s request, his wife signed them as surety. To secure the payment of the notes a mortgage was executed on the entire property by both husband and wife.

Held, that under section 5119, R. S. 1881, both the notes and the mortgage are void as to the wife, and that her interest in the real estate can not be affected thereby, but it is otherwise as to the husband's interest.

Jones v. Ewing, 315

MASTER AND SERVANT.

See RAILROAD, 3.

MEASURE OF DAMAGES.

See ATTORNEY AND CLIENT; GUARDIAN AND WARD, 4; HUSBAND AND WIFE, 3, 4; PROMISSORY NOTE, 6; RAILROAD, 17.

MECHANIC'S LIEN.

See SHERIFF'S SALE, 3.

MERGER.

See GUARANTY, 5.

MINER'S LIEN.

Coal Mines.—Interest to Which Lien Attaches.—Lessor and Lessee.—Statute Construed.—The lien which section 5471, R. S. 1881, imposes in favor of persons employed in and about coal mines, applies only to such interest or estate as the person operating the mine has therein. It does not bind the property of a lessor.

Hopkins v. Hudson, 191

MINOR.

See CRIMINAL LAW, 24; GUARDIAN AND WARD; INTOXICATING LIQUOR, 1, 2.

MISTAKE.

See CRIMINAL LAW, 5; INSTRUCTIONS TO JURY, 3.

MORTGAGE.

See CHATTEL MORTGAGE; GUARDIAN AND WARD; HUSBAND AND WIFE, 5 to 9; MARRIED WOMAN; PLEDGE.

1. *Foreclosure.—Personal Judgment.—Promissory Note.—Complaint.—Exhibit.*—Where a complaint to foreclose a mortgage, and for personal judgment on the note secured by it, does not set out or exhibit the note or a copy, it is bad on demurrer.

Roche v. Moffitt, 58

2. *Same.—Practice.*—Where the complaint demands judgment for a specified sum, and the plaintiff takes a personal judgment on the note

- secured by the mortgage, he can not claim on appeal that his demand was for a foreclosure merely. *Ib.*
3. *Consideration.*—The promise of one to pay a debt for which he is already liable as surety is not a sufficient consideration to support a mortgage. *Harris v. Cassidy, 158*
4. *Same.—Release of Groundless Claim.*—Where a claim is without foundation, a release will not constitute a valid consideration for a mortgage. *Ib.*
5. *Promissory Note.—Action to Procure Surrender and Cancellation.—Check.—Failure of Bank.—Liability for Loss.*—B. employed C. & N. to negotiate a loan for him. They applied to D. & Co., who procured the money from their principal, the Security Company, and deposited it in bank. Shortly thereafter, B. executed his note and mortgage for the amount and delivered them to D. & Co., who left a check on the bank with N. to be delivered to B. when he had obtained the release of prior encumbrances on his land, which the latter agreed to obtain at a certain date. B. did not carry out his agreement at the time fixed, nor subsequently, and ten days later, while the check was still in the hands of N., the bank failed.
- Held*, that B. is not liable for the loss, and that he may maintain an action against the Security Company for the surrender and cancellation of the note and mortgage. *Security Co. v. Ball, 165*
6. *Foreclosure.—Parties.—Titles.*—Where one is made a party defendant to a suit to foreclose a mortgage, it is necessary for him to set up his interest, as the purpose of the statute upon the subject of parties defendants is to settle all conflicting titles and to determine the whole controversy in one suit. *Bundy v. Cunningham, 360*
7. *Judgment.—Foreclosure.—Adjudication of Titles.—Conclusiveness.*—A decree, in a suit to foreclose a mortgage, adjudicating the titles involved, is conclusive upon the parties. *Ib.*
8. *Foreclosure.—Parties.—Owner of Equity of Redemption.*—An owner or holder of the equity of redemption from the mortgagor or a mesne purchaser, is as necessary a defendant to a suit to foreclose as a mortgagor still owning the land, and if not made a party the decree is void as to him. *Daugherty v. Deardorf, 527*
9. *Promissory Notes.—Assignment of Part of Series.—Priority of Lien.*—The assignment of one or more of a series of notes executed by the same person, and secured by mortgage, operates as an assignment, *pro tanto*, of the mortgage. The notes so assigned stand as so many successive mortgages, and the holders have priority of lien in the order in which their respective demands become due. *Parkhurst v. Watertown, etc., Co., 594*
10. *Same.—Retention of Part of Series of Notes by Mortgagee.—Rights of Assignees Holding Other Notes.*—The assignees of a part of a series of notes secured by mortgage are entitled to payment out of the mortgage fund, in preference to the notes retained by the mortgagee, although the latter mature first; but this rule does not affect the rights of the assignees as between themselves, and where they take their assignments at the same time, their notes will have preference according to the date of their maturity. *Ib.*

MOTION TO QUASH.

See APPEAL, 3; CRIMINAL LAW, 39, 43.

MUNICIPAL CORPORATION.

See CITY; NEGLIGENCE, 8 to 10.

MURDER.

See CRIMINAL LAW, 9 to 13.

MUTUAL BENEFIT ASSOCIATION.

See LIFE INSURANCE.

NEGLIGENCE.

See CITY, 1 to 10; CRIMINAL LAW, 34; GUARDIAN AND WARD, 3, 4; JURISDICTION; RAILROAD, 9 to 15; WITNESS, 4.

1. *Railroad.—Complaint for Injury at Crossing.—Wilfulness.—Contributory Negligence.*—A complaint against a railroad company to recover damages for an injury received at a crossing and alleged to have been "caused by the reckless, negligent and wilful conduct of the defendant's employees" in propelling a locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by bell or whistle, is not good as charging a wilful injury, and, there being no averment negating contributory negligence, it is bad on demurrer.

Louisville, etc., R. W. Co. v. Bryan, 51

2. *Contributory Negligence.—Wilfulness.*—To entitle one to recover for an injury to which his own negligence may have contributed, the injurious act must have been purposely and intentionally committed, with a design to produce injury; or it must have been committed under such circumstances as that its natural and probable consequence would be to produce injury to others.

Belt R. R., etc., Co. v. Mann, 89

3. *Railroad.—Freight Train Passengers.—Assumption of Risks.—Care Required of Company.—Presumption.*—When a person becomes a passenger on a freight train, he assumes the risks necessarily and reasonably incident to being carried by that method; but it is the duty of the railway company to exercise the highest degree of care for the safety of such passengers, consistent with the usual and practical operation of freight trains, and the same presumptions arise in favor of a passenger who is injured while submitting to the regulations of the company as in the case of a passenger on any other train.

Woolery v. Louisville, etc., R. W. Co., 381

4. *Same.—Jumping from Train to Escape Apprehended Danger.—Contributory Negligence.*—If one, induced by groundless fear, leaps from a car while the train is in rapid motion and is killed, when there is no reasonable cause to apprehend danger to life or limb, then, even though the railroad company is guilty of negligence in loading a lumber car, which, by reason of the lumber falling off and striking the car occupied by the passenger, causes the latter's alarm, there can be no recovery.

Ib.

5. *Same.—When there May be a Recovery.*—It is only where, by the negligence or misconduct of another, one is put to the choice of adopting the alternative of an attempt to escape, or of remaining under an apparently well grounded apprehension of serious personal injury, that there can be a recovery for an injury received in pursuing the former course.

Ib.

6. *Same.—Instruction.—Duty of Court.*—It is the duty of the court to instruct the jury as to what facts, within the issues in the case, if established by proof, will or may, under the circumstances, constitute contributory negligence, leaving to the jury the duty of discovering whether such facts and circumstances are proved.

Ib.

7. *Complaint.*—A complaint to recover damages for the death of a person must show that the death resulted from the negligent acts charged.

Louisville, etc., R. W. Co. v. Thompson, 442

8. *Towns and Cities.—Permitting Objects Calculated to Frighten Horses to Remain on Street.*—Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses,

of ordinary gentleness, at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed, and to remain upon the street.

Town of Rushville v. Adams, 475

9. *Same. — Complaint. — Demurrer. — Motion to Make Specific. — Practice.*—Where the averments in the complaint in regard to negligence are not sufficiently specific, the objection must be reached by motion to make more specific, and not by demurrer for want of facts. *Ib.*
10. *Same.*—A general averment that the injury complained of was not caused by any negligence on the part of the plaintiff, but was caused wholly by the negligence of the defendant, a town, in permitting a person to carry on the business of making candy on the street, makes the complaint good as against a demurrer for want of facts. *Ib.*

NEW TRIAL.

See ARGUMENT OF COUNSEL; CRIMINAL LAW, 4, 37; JUDGMENT; PRACTICE, 7, 8; SUPREME COURT, 9.

1. *As of Right. — Waiver of Objection to. — Time of Granting.*—Where, in an action for the recovery of real estate, a new trial is granted as a matter of right prior to the rendition of judgment, without exception or objection, and the parties proceed to try the case a second time, the objection, which might have been made to the granting of a new trial before judgment, is waived. *Hutchinson v. Lemcke, 121*
2. *Newly Discovered Evidence. — Lost Document. — Proof of Contents by Parol.*—A new trial will not be granted a party on the ground of newly discovered evidence, consisting of a lost document which he knew at the time of the trial to be in existence, and the contents of which, upon proof of loss, he could have proved by parol. *Chapman v. Moore, 223*
3. *As of Right. — When Not Proper. — Different Causes of Action.*—Where a litigation proceeds to judgment on any substantive cause of action, in which a new trial as of right is not allowable, then, even though it embraces other causes in which a new trial as of right is allowable, a new trial as of right is not proper. *Bradford v. School Town of Marion, 230*
4. *Newly Discovered Evidence. — Cumulative Evidence.*—Newly discovered evidence, which is merely cumulative to that adduced at the trial, will not authorize a new trial. *DeHart v. Aper, 460*
5. *Same. — Conflicting Evidence in Support of. — Supreme Court. — Practice.*—Where the evidence offered in support of a motion for a new trial is conflicting, the decision of the trial court will not be reviewed on appeal. *Ib.*
6. *Motion. — Must be Sufficient as to all who Unite.*—If a motion for a new trial is not well made as to all who unite in it, there is no error in overruling it. *Wolfe v. Kable, 565*

NOTARY PUBLIC.

See DRAINAGE, 7.

NOTICE.

See CITY, 2, 3, 8; CRIMINAL LAW, 35; DRAINAGE, 3, 5; FEES AND SALARIES, 1; INTOXICATING LIQUOR, 3; LIFE INSURANCE, 1; PROMISSORY NOTE, 3; RAILROAD, 7, 20; TOWNSHIP TRUSTEE, 1.

Appearance. — Waiver.—Where there is an appearance without objection, or where there is any act indicating consent, want of notice will be deemed waived. *Cleveland v. Obenchain, 591*

NUISANCE.

See CRIMINAL LAW, 29 to 35.

OFFICE AND OFFICER.

See BOND; EXTRADITION, 2 to 4; FEES AND SALARIES.

1. *Certificate.—Official Signature.*—No certificate, whether in a judicial or other legal proceeding, is complete without the signature of the officer required by law to make the attestation. *Marshall v. State, ex rel., 173*
2. *Certificate.—Recital of Facts Not of Record.*—A public officer may certify as to matters contained in the records of his office, but he can not recite facts not appearing of record. *Daggett v. Bonewitz, 276*
3. *Contest Between Claimants of Office.—Quo Warranto by State.*—The fact that a contest proceeding between the persons claiming a public office is pending, does not affect the right of the State to proceed by information against the incumbent. *Vogel v. State, ex rel., 374*
4. *Same.—Justice of Peace.*—The office of justice of the peace is a judicial office under the Constitution and statutes of this State. *Ib.*
5. *Same.—Judicial Office.—Constitutional Ineligibility.—Extent of.*—A judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term, the disability imposed by the Constitution merely having reference to the taking and holding of the office. *Ib.*
6. *Same.—Term of Office.—Computation of Time.—Township Trustee.*—Where an officer's commission fixes his term at four years from a certain day, that day will be counted as a part of the term; but where it is provided by the law that the inspectors' certificate of election shall entitle the holder to qualify and enter upon the discharge of the duties of the office of township trustee at the expiration of ten days from the day of election, the day of the election is to be excluded in computing the time. *Ib.*
7. *Same.—Judicial and Other Office Ending and Beginning on Same Day.*—Where the term of a justice of the peace did not expire until midnight of the 16th day of the month, he is ineligible to hold the office of township trustee where the term of such office began on the same day. *Ib.*
8. *Same.—Votes Cast for Ineligible Can Not be Counted Against Eligible Candidate.*—The votes cast for an ineligible candidate can not be counted against a candidate who is eligible, and the latter, if he has received the next highest number of votes, is entitled to the office. *Ib.*

PARTIES.

See DECEDENTS' ESTATES, 3, 4, 9, 10; HUSBAND AND WIFE, 1, 2; MORTGAGE, 6 to 8.

PARTITION.

See DESCENT, 3; WITNESS, 5.

1. *Primary Object of Suit for.—Title.—Conclusiveness of Judgment.*—While the primary object of a suit for partition is to sever the unity of possession and allot the respective shares of the parties, and not to create or vest new or settle conflicting titles, yet, if any question as to existing titles is properly made by the pleadings, and judgment is rendered thereon, the adjudication is conclusive as between the parties, but it will not affect after-acquired titles. *Thorp v. Hanea, 324*
2. *Same.—Childless Second Wife.—Allotment of Interest to.—Descent.—Res Adjudicata.*—Where a widow, a childless second wife, alleged in her petition for partition that she was the owner in fee simple of one-third of her deceased husband's real estate, and the judgment assumed to set apart to her such interest, such judgment will not bar the husband's children by a former marriage from setting up, as against a remote grantee of the widow, the title acquired by them at her death. *Ib.*

3. *Question of Title*.—Ordinarily, an action for partition does not present the question of title for adjudication, but the pleadings may be so framed as to present that question. *Spencer v. McGonagle, 410*
4. *Same.—Pleading — Theory*.—*Specific Facts Control General Averments*.—Where a plaintiff undertakes to set forth the facts which constitute his title, he will fail unless they are sufficient to give title on the theory on which the pleading proceeds, as the specific facts will control, and not the general averments. *Ib.*

PATENT.

See SCHOOL LAND.

PENALTIES.

See TELEGRAPH COMPANY.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; CONVERSION; INJUNCTION, 4; JURISDICTION; PLEDGE; REPLEVIN.

PERSONAL SERVICES.

See ATTORNEY AND CLIENT.

PLEADING.

- See ACTION; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; CITY, 1, 2, 14, 17; CONTRACT, 3; CONVERSION, 2; COUNTY COMMISSIONERS; CRIMINAL LAW; DECEDENTS' ESTATES, 2; DRAINAGE; EQUITY; HUSBAND AND WIFE, 1, 6; JUDGMENT; LIFE INSURANCE; MORTGAGE, 1, 2; NEGLIGENCE, 1, 7, 9, 10; PARTITION, 1, 3, 4; PRACTICE; PROMISSORY NOTE, 2; QUIETING TITLE; REMEDIES, 1; SET-OFF; SHERIFF'S SALE, 4, 5; SUPREME COURT; TAXES, 8; TELEGRAPH COMPANY, 1; TOWNSHIP TRUSTEE, 2; TURNPIKE, 1.
1. *Single Answer to Several Paragraphs of Complaint.—Practice*.—Where a single answer is filed to two paragraphs of complaint, it is not good on demurrer unless it is sufficient as to both.
Falmouth, etc., T. P. Co. v. Shawhan, 47
 2. *Practice.—Verdict on Complaint Containing Bad Paragraph.—Supreme Court*.—Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad the judgment will be reversed.
Bell R. R., etc., Co. v. Mann, 89
 3. *Same.—Sufficiency of Complaint.—Evidence*.—In determining the sufficiency of the complaint, neither the evidence nor the result reached can be considered. *Ib.*
 4. *Same*.—Sections 338, 376 and 658, R. S. 1881, can not be resorted to in aid of a complaint which fails to state facts sufficient to constitute a cause of action. *Ib.*
 5. *Construction*.—A pleading must proceed upon some single, definite theory, which must be determined from the general scope and character of the pleading.
First Nat'l Bank v. Root, 224
 6. *Construction.—Written Instruments.—Accounts.—Exhibits.—Uncertain Averments*.—In construing pleadings, written instruments and accounts filed therewith as required by section 362, R. S. 1881, may be looked to in aid of uncertain averments, and in many instances they are controlling.
Blount v. Rick, 238
 7. *Reply.—Demurrer.—Certainty*.—Where a demurrer to a reply is sufficient to indicate with reasonable certainty what paragraph of the answer the reply fails to avoid, it presents the question of the sufficiency of the reply.
Buscher v. Knapp, 340

8. *Exhibit.—Written Instrument.—Defect Cured by Finding.—Practice.*—Under section 362, R. S. 1881, a complaint is defective for want of the original, or a copy, of the written instrument on which it is founded; but, in the absence of a demurrer, the defect will be cured by the finding of the court. *Owen School Tp. v. Hay, 351*
9. *Same.—Sufficiency of Complaint as to Part of Demand.—Demurrer.*—Where a complaint is sufficient as to a part of the demand, it will withstand a demurrer which questions it as a whole. *Ib.*
10. *Same.—Common Schools.—Teacher.—Contract.—Motion in Arrest.—Assignment of Error.*—A complaint to recover on a contract for teaching in the public schools, which avers that the plaintiff "performed all and singular her duties according to said contract," is not bad on a motion in arrest of judgment nor on an assignment of error in the Supreme Court, because it fails to allege specifically performance of a duty imposed by law. *Ib.*
11. *Written Instrument.—Exhibit.*—It is only where a pleading is founded on a written instrument that the original or a copy must be filed with the pleading. *Watts v. Fletcher, 391*
12. *Answer.—Demurrer.*—An answer must respond to the entire complaint, or to so much as it purports to answer, or it will be bad on demurrer for the want of facts. *McLead v. Aetna Life Ins. Co., 394*
13. *Amendment After Finding.—When not Available for Reversal.*—Where it does not appear that the defendant was prejudiced by the amendment of the complaint after the finding was announced, the judgment will not be reversed. *Judd v. Small, 398*
14. *General Denial.—Evidence.*—An answer in general denial puts the plaintiff to proof of all the material allegations of his complaint. *City of Lafayette v. Wortman, 404*
15. *Answer in Abatement.—Demurrer.—Reaching Back.*—A demurrer to an answer in abatement does not reach back to the complaint. *Indiana, etc., R. W. Co. v. Foster, 430*
16. *Scope and Tenor.*—The character of a pleading must be determined from its general scope and tenor. *Louisville, etc., R. W. Co. v. Thompson, 442*
17. *Complaint.—Sufficiency of.*—A complaint, showing a cause of action, will repel a demurrer although it may not entitle the plaintiff to all the relief prayed. *Bloomfield R. R. Co. v. Van Slike, 480*
18. *Practice.—Complaint.—Demurrer.*—A demurrer which is addressed to a complaint consisting of more than one paragraph, as an entirety, will be overruled if one paragraph be good. *Redelsheimer v. Miller, 485*
19. *Same.—Misjoinder of Parties Not Cause for Demurrer.*—Misjoinder of parties is not a cause for demurrer. *Ib.*
20. *Striking Out.—Record.—Bill of Exceptions.—Supreme Court.*—Where a pleading has been rejected, or a part stricken out, the pleading or the part stricken out will not thereafter constitute a part of the record on appeal to the Supreme Court, unless embodied in a bill of exceptions, or made so by an order of the trial court. *Carrothers v. Carrothers, 530*
21. *Opening Issues for Additional Pleadings.—Discretion of Trial Court.*—The opening of the issues for the purpose of filing additional pleadings is to a great extent discretionary with the trial court, and an abuse of discretion must be shown to justify a reversal of the judgment. *Bever v. North, 544*

PLEDGE.

1. *Contract.—Collateral Security.—Withdrawal on Reduction of Debt.—Transfer of Collaterals.*—Where bonds and stocks are pledged as collateral security, under a contract stipulating that in the event of the reduc-

tion of the indebtedness, the pledgeor should be entitled to select and withdraw from the securities so pledged an amount equal to the reduction, one to whom the pledgeor has sold and transferred a part of such securities can maintain his right to them, as against the pledgee, where it is shown that prior to such transfer the pledgeor had paid, or caused to be paid, on such indebtedness, a sum in excess of the value of the securities so transferred. *First Nat'l Bank v. Root*, 224

2. *Same.—Consideration.*—In such case, the pledgeor can sell and transfer, either with or without consideration, the securities which he had the right under the contract to withdraw. *Ib.*
3. *Same.—What will Constitute Reductions of Indebtedness.*—In such case, reductions of the indebtedness, effected in part by means of sales of property mortgaged to secure the indebtedness, rents of real estate the possession of which had been voluntarily delivered to the pledgee, sales of property on execution, etc., are reductions within the meaning of the contract. *Ib.*

POWER OF ATTORNEY.

See RAILROAD, 5.

PRACTICE.

See APPEAL; BILL OF EXCEPTIONS; CHANGE OF VENUE; CITY, 15 to 17; CONTINUANCE; COUNTY COMMISSIONERS; CRIMINAL LAW; DECEDENTS' ESTATES, 3, 7; DIVORCE, 1, 2; DRAINAGE; EVIDENCE; GUARDIAN AND WARD, 7; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUDGMENT; NEGLIGENCE, 9; NEW TRIAL; NOTICE; PLEADING; REMEDIES; SPECIAL FINDING; SUPREME COURT; WITNESS, 1, 2.

1. *Objection to Evidence Must be Specific.—Supreme Court.*—A general objection that evidence is incompetent and immaterial, is not sufficient to present any question on appeal. *Chapman v. Moore*, 223
2. *Exclusion of Evidence.—Misconduct of Counsel in Argument.—Affidavit.—Bill of Exceptions.*—Rulings of the trial court in excluding evidence, or in refusing to check the misconduct of counsel in argument, can not be brought into the record by affidavit. The proper mode is by a bill of exceptions. *Buscher v. Scully*, 246
3. *Trial Without Issue.—Judgment by Confession.*—Where, without objection, a party alleging affirmative matter in his pleading goes to trial without requiring an issue to be formed upon such pleading, he can not afterwards ask judgment in his favor as by confession. *June v. Payne*, 307
4. *Dismissal of Action.*—A plaintiff may dismiss his action at any time before the jury retire. *Louisville, etc., R. W. Co. v. Worley*, 320
5. *Same.—Objections Must be Specific to be Available.*—Objections, in order to be available, must be specifically made in the trial court. Mere general objections are not available on appeal. *Ib.*
6. *Admission of Evidence.—Objections to.*—Objections to the admission of evidence must be specifically stated to be available on appeal. *Bundy v. Cunningham*, 360
7. *New Trial.—Excessive Damages.*—A question as to excessive damages must be presented by an assignment in the motion for a new trial. *Ringle v. First Nat'l Bank*, 425
8. *Exclusion of Evidence.—Question as to, How Presented.*—To present a question upon the exclusion of evidence, the particular evidence excluded must be specified with reasonable certainty in the motion for a new trial. *Louisville, etc., R. W. Co. v. Thompson*, 442
9. *Same.—Harmless Error.*—It is only a material error which will authorize the reversal of a judgment. *Ib.*

10. *Admission of Evidence.—Harmless Error.*—The erroneous admission of immaterial and harmless evidence will not authorize the reversal of the judgment. *Lake Erie, etc., R. W. Co. v. Griffin, 464*

PRESUMPTION.

- See ABATEMENT; CITY, 14; CONTRACT, 3; CORPORATION, 1; CRIMINAL LAW, 8, 35; EVIDENCE, 3; EXTRADITION, 2; NEGLIGENCE, 3; RAILROAD, 1, 10 to 12; SPECIAL FINDING, 2, 5, 6; WITNESS, 5.

PRINCIPAL AND AGENT.

- See GUARANTY; RAILROAD, 3; TELEGRAPH COMPANY, 2.

PRINCIPAL AND SURETY.

- See BOND; GUARANTY; HUSBAND AND WIFE, 5 to 7; MARRIED WOMAN.

1. *Contribution.—Claim for Against Decedent's Estate Triable by Jury.*—A claim for contribution by a surety against the estate of a deceased co-surety is triable by jury. *Sanders v. Wheelburg, 266*
2. *Same.—Security Held by One Surety Enures to Benefit of All.—Trust.*—Where one surety obtains a security, it enures at once to the benefit alike of himself and his co-surety. He occupies the position of a trustee for his co-surety, and can not deal with the fund to the prejudice of the latter. *Ib.*
3. *Same.—Purchase at Judicial Sale by One Surety of Principal's Property.—Rights of Co-Surety.*—Where one surety, having paid a judgment for which he and his co-surety are liable, sues out execution thereon and procures the sale of the principal's property, which he purchases at comparatively nominal prices, and then sues his co-surety for contribution, the latter may show, in bar of the suit, that such property of the principal, at its fair value, was sufficient to satisfy the judgment. *Ib.*

PROCESS.

- See CORPORATION, 1.

PROMISSORY NOTE.

- See GUARDIAN AND WARD, 6; MARRIED WOMAN; MORTGAGE; SET-OFF.

1. *Consideration.—Parol Evidence.—Advancement.*—It is competent to show by parol the consideration of a promissory note, and where it is without consideration, or executed merely as evidence of an advancement by a father to a son, it can not be enforced. *Buscher v. Knapp, 340*
2. *Same.—Pleading.—Will.*—Where it is answered that the note sued on was executed as evidence of an advancement, a reply that by the terms of the will of the payee such note was not intended as an advancement, is bad. *Ib.*
3. *Assignment.—Defences.—Notice.—Deed.—Covenant Against Encumbrances.*—In a suit by the assignee of a non-commercial note, executed in consideration of the conveyance of real estate by warranty deed, an answer by the defendant that he had been compelled to pay an encumbrance on the land, and asking that the amount might be allowed against any sum due on the note, is good, without negating notice on his part of the encumbrance when he took his deed, or charging the plaintiff with notice of the defence when the note was assigned to him. *Watts v. Fletcher, 391*
4. *Contribution.*—Where one of two joint makers pays a note, he may maintain an action against his co-obligor for the amount which the latter ought to have paid. *Judd v. Small, 398*
5. *Recital that it is Given Subject to Contemporaneous Contract.—Negotiability.—Showing by Assignee in Order to Recover.*—Where a promissory note recites that it "is given in consideration of and is subject to one cer-

tain contract existing between" the payee and maker, of even date with the note, it is not, under section 5506, R. S. 1881, negotiable as an inland bill of exchange, nor governed by the law merchant, although payable at a bank in this State, and an assignee of such note before maturity takes it subject to all the equities between the maker and payee, and he can not recover thereon until he has shown that the payee had performed his part of the contract, or, being ready to do so, was prevented by the maker. *McComas v. Haas, 512*

6. *Same.*—*Contract for Purchase of Machines.*—*Measure of Damages.*—In such case, where the contract recited that the maker of the note had bought of the payee a certain number of hay-forks at a stipulated price each, a certain part to be paid as each machine was ordered and the note given to secure the balance, the measure of damages, in an action on the note and contract, is the difference between the contract price and the market price at the time the machines ought to have been accepted. *Ib.*

PROSECUTING ATTORNEY.

See CORPORATION, 2; CRIMINAL LAW, 19; EXTRADITION, 3, 5; OFFICE AND OFFICER, 3.

QUIETING TITLE.

1. *Adverse Claim.*—*Sufficiency of Complaint.*—Under section 1070, R. S. 1881, the allegation in a complaint to quiet title to real estate, that the defendant's claim of title is adverse to the plaintiff, is sufficient without averring that it is untrue, injurious or wrongful. *Rausch v. Trustees, etc., 1*
2. *Same.*—*Cross Complaint.*—A cross complaint to quiet title, alleging that the cross complainant is the owner of the property in controversy, and that the plaintiff's claim thereto is a cloud upon his title, is good. *Ib.*
3. *Same.*—*Street Improvement Lien.*—*Sale.*—*Merger.*—Where, in a suit to quiet title, the defendant files a cross complaint, setting up a sale to him of the property by the proper officer in satisfaction of an assessment in his favor for a street improvement, and seeking to hold a lien upon the property, but not alleging that the proceedings were not effectual to convey title, or that the plaintiff claimed any interest in the property, does not state a cause of action. *Ib.*
4. *Same.*—*Deed.*—*Exhibit.*—A deed under which one claims to be the owner of property is merely evidence of title, and not a proper exhibit to a complaint to quiet title. *Ib.*

QUO WARRANTO.

See CORPORATION, 2; OFFICE AND OFFICER, 3.

RAILROAD.

See CORPORATION, 1; INTERROGATORIES TO JURY, 4; JURISDICTION; NEGLIGENCE, 1 to 7.

1. *Proceedings to Appropriate.*—*Collateral Attack.*—*Presumption.*—In a collateral attack upon the validity of proceedings by a railroad company to appropriate land for its use, by a person who was a party thereto, every reasonable presumption will be indulged in favor of the regularity of such proceedings, in the absence of any showing to the contrary. *Indiana, etc., Co. v. Louisville, etc., R. W. Co., 301*
2. *Same.*—*Award of Damages.*—*Remedy of Aggrieved Land-Owner.*—*Action to Recover Real Estate.*—A party aggrieved by an award of damages made by the appraisers in an appropriation proceeding instituted under section 3907, R. S. 1881, may have the award reviewed by the court in which such proceedings are had, on written exceptions filed within

ten days after the filing of such award. This is the only remedy provided by the statute, and if it be not pursued, the land-owner can not afterwards maintain an action to recover the land appropriated. *Ib.*

3. *Injured Employee.—Power of Conductor to Employ a Surgeon.—Principal and Agent.*—A railroad conductor, in a pressing emergency, may employ a surgeon to attend a brakeman who is injured while on duty, and, in a proper case, bind the company for the professional services so rendered; but he can not authorize the surgeon to employ, at the expense of the company, such assistants as he may deem necessary.
Terre Haute, etc., R. R. Co. v. Brown, 336
4. *Surveying Right of Way.—Trespass.*—An entry upon land by a railroad company for the purpose of making a survey for a right of way is not an actionable wrong.
Burrow v. Terre Haute, etc., R. R. Co., 432
5. *Same.—Contract for Right of Way.—Consideration.—Power of Attorney.*—A written contract which releases and quitclaims to certain persons, in consideration of benefits to accrue, a right of way for railroad purposes, in trust for a railroad company, is not a power of attorney, but it invests in the persons named an immediate right to the real estate described. *Ib.*
6. *Same.—Description.—Right of Company to Select Particular Location.*—Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and no more definitely, it vests in the railroad company the right to select the particular location. *Ib.*
7. *Same.—Relinquishment of Damages.—Subsequent Purchaser.—Notice.*—Where a property owner, in conveying a right of way to a railroad company, relinquishes all claims for damages by reason of the construction of the railroad upon the land conveyed, it is final as to all damages that can arise from a proper construction of the road, and protects the company from liability to a subsequent purchaser of the land, with notice. *Ib.*
8. *Same.—License.—Revocation.*—A license founded on a valuable consideration is not revocable. *Ib.*
9. *Negligence.—Fraudulent Use of Pass Issued to Another.—Liability of Carrier.*—One who fraudulently attempts to ride on a non-transferable pass issued to another person, is not a passenger to whom the carrier owes a duty to carry safely, and he can not maintain an action for injuries caused by the carrier's negligence.
Louisville, etc., R. W. Co. v. Thompson, 442
10. *Same.—Finding Pass on Person of Deceased Traveller.—Presumption.—Burden of Proof.*—Where a non-transferable pass issued to another person is found in the pocket of one who is killed by the negligence of a railroad company, but there is no other evidence that the deceased had procured the pass fraudulently, or was attempting to travel on it, the burden is on the defendant, in an action for damages, to overcome the presumption that the deceased was a *bona fide* passenger. *Ib.*
11. *Same.—Conflict of Presumptions.*—Where the facts of a case are consistent with both honesty and dishonesty, the courts will adopt the construction which is in favor of honesty and good faith. *Ib.*
12. *Same.—Presumption that One is a Lawful Passenger.—Conductor's Check.*—Where one is carried upon a passenger train for many hours, and the conductor of the train has given him a check, which is found upon his person after he has been killed by the carrier's negligence, it will be presumed, in the absence of countervailing evidence, that he was lawfully upon the train as a passenger. *Ib.*
13. *Same.—Defective Bridge.—Burden of Proof.*—Where a passenger, right-

- fully on a train, is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence, and the owner is upon it to prove the contrary. *Ib.*
14. *Same.—Bridge Weakened by Flood.—Extent of Carrier's Liability.*—Where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it, the railroad company is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill. *Aliter*, if its unsafe condition may reasonably be discovered in time to avoid danger. *Ib.*
 15. *Same.—Sufficient to Prove Substance of Issue.*—In actions against carriers to recover for injuries resulting from negligence, it is sufficient to prove the substance of the issue. *Ib.*
 16. *Judicial Sale of Property and Franchises.—Liability of New Corporation for Debts of Predecessor.*—Ordinarily, where a new railroad corporation is organized by the purchasers, at a judicial sale, of the property, rights and franchises of a previously existing railroad company, it does not become liable at law for the payment of the debts of its predecessor.
Lake Erie, etc., R. W. Co. v. Griffin, 464
 17. *Same.—Use of Land Appropriated by Old Company.—Compensation to Owner.—Value of Land.—Conclusiveness of Judgment in Appropriation Proceedings.*—Where, however, a new railroad corporation, upon succeeding to the property, rights and franchises of its predecessor, elects to adopt an appropriation of land, made by the old company, by entering upon and using and occupying the same for the purposes of its road, to the entire exclusion of the owner, it is bound to make compensation to the owner, and where, in the appropriation proceedings, the value of the land has been determined by the judgment of a court of competent jurisdiction, the new corporation is concluded by the judgment upon the question of value. *Ib.*
 18. *Same.—Abandoning Use of Appropriated Land will not Defeat Payment Therefor.*—In such case, where suit is brought against the new corporation by the owner of the land to recover its adjudged value, the defendant can not escape payment by abandoning its use and occupancy for railroad purposes, and by ceasing to exclude the plaintiff from its use and enjoyment. *Ib.*
 19. *Appropriation of Land.—Receiver.—Right of Action.*—Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the corporation, and, after the discharge of the receiver, the corporation resumes control of the railroad, and retains possession of and uses the land, the owner can maintain an action to recover and for damages.
Bloomfield R. R. Co. v. Van Slyke, 480
 20. *Same.—Notice by Receiver to File Claims no Bar.*—Such a right of action can not be barred by the notice of the receiver, requiring creditors to present their claims against the corporation. *Ib.*

REAL ESTATE.

- See CONVEYANCE; DECEDENTS' ESTATES, 2 to 6, 8 to 10; DEED; DESCENT; DRAINAGE; EVIDENCE, 2, 8 to 10; HUSBAND AND WIFE, 5 to 9; JURISDICTION; MARRIED WOMAN; MINER'S LIEN; PARTITION; PROMISSORY NOTE, 3; QUIETING TITLE; RAILROAD, 1, 2, 5 to 8, 17 to 20; REAL ESTATE, ACTION TO RECOVER; SCHOOL LANDS; SHERIFF'S SALE; TAXES; WILL; WITNESS, 5.
1. *Grantor and Grantee.—Covenant of Warranty.—Action by Third Person for Possession.—Notice to Grantor to Defend.*—Where an action to recover possession of land is brought by one claiming to be the owner, and the grantor is notified of the action by his grantee, he will be bound by the judgment which results.
Bever v. North, 544

2. *Same.—Eviction.—Appeal.*—Where a judgment of eviction is rendered against the grantee, it is not his duty to appeal, but he may yield possession and sue upon the covenants in his deed. *Ib.*
3. *Same.—Wife's Interest an Estate, and not Mere Encumbrance.*—In this State the wife's interest in the real estate of her husband is not an encumbrance, but an estate in the land itself. *Ib.*
4. *Same.—Operation of Deed can not be Defeated by Parol.*—In an action against a grantor on the covenant of warranty, an answer that the plaintiff contracted for the land subject to the interest of the wife of a previous owner in one-third thereof, and that he agreed to assume and pay off the encumbrance created by her estate, is bad, as a grantor can not, by parol, defeat the operation of his deed. *Ib.*
5. *Deed.—Description.—Highway.—Boundary.*—Where land is described as bounded by an existing road or street, it is to be construed as referring to one actually opened and in use by the public.
Cleveland v. Obenchain, 591
6. *Same.*—Where a road has been opened and used for a long period of time, a vendee, who buys land described as bounded upon it, can not be affected by the fact that it was not laid out according to the original order. *Ib.*

REAL ESTATE, ACTION TO RECOVER.

See DESCENT, 4; RAILROAD, 2, 19; REAL ESTATE, 1, 2.

1. *Plaintiff Must Succeed on Strength of His Own Title.*—In an action to recover the possession of real estate, the plaintiff must recover, if at all, on the strength of his own title. *Castor v. Jones, 283*
2. *Same.—Will.—Title.—Widow's Right to Possession.*—A testator devised land to R. to have and hold and have full use and possession of during the natural life of the testator and his wife. R. was to have all the testator's property at the death of the latter and his wife. He was to live on the farm with the testator and to comply with the will "during the natural lifetime of myself and said wife." Immediately following the devise to R. during the natural life of the testator and wife was the following provision: "For and in consideration of the above said R. is to take care of me and of my wife during our natural lifetime, and be at all expense every way in doctoring and funeral expenses." The testator's wife survives him.
Held, that the devise to R. will not take effect, so as to vest in him a fee simple title, until the death of the widow.
Held, also, that neither R., nor any one claiming through him, can, by any right given in the will, maintain an action to oust the widow from the land, but that she is entitled to possession during her life. *Ib.*

RECEIPT.

See CONTRACT, 1.

RECEIVER.

See RAILROAD, 19, 20.

RECORDING WRITTEN INSTRUMENT.

See CHATTEL MORTGAGE; DEED, 3.

REDEMPTION.

• See SHERIFF'S SALE.

REMEDIES.

See ACTION; CHATTEL MORTGAGE, 2; CITY, 18; CONVERSION; CORPORATION, 2; EQUITY; HUSBAND AND WIFE, 2; RAILROAD, 2; TAXES, 7, 8.

1. *Review of Judgment.—Election Between Remedies.*—A party can not pros-

ecute an appeal and a suit to review, but must elect between these remedies. *Buscher v. Knapp, 340*

2. *Same.—Pendency of Appeal.—How Question as to Presented.—Practice.*—A question of the pendency of an appeal can not be presented by a motion to dismiss the complaint to review. The proper method, where the fact that an appeal has been prosecuted is not apparent on the face of the record, is by answer. *Ib.*

REPEAL OF STATUTE.

See CHANGE OF VENUE, 1; DRAINAGE, 10.

REPLEVIN.

1. *Judgment for Return of Property.—Bond.*—Where, in replevin proceedings, the plaintiff is awarded a return of the property, it must be returned, without demand, in as good condition as when received by the defendant under the bond, and within a reasonable time after the order is made. *June v. Payne, 307*
2. *Same.—Appeal.—Delay in Returning Property.—Action on Bond.—Mitigation of Damages.*—Where, after an appeal to the Supreme Court by the defendant to replevin proceedings, against whom a return of the property is awarded, there is an implied understanding that no measures to enforce the penalty of the bond for a return will be taken until the appeal is disposed of, and no such steps are in fact taken until a few days before the final decision in the case, when the property is returned in good condition, the delay is not unreasonable, and in an action on the bond the return may be considered by the jury in mitigation of damages. *Ib.*

RES ADJUDICATA.

See CHANGE OF VENUE, 3; DECEDENTS' ESTATES, 4, 8; DRAINAGE, 8; MORTGAGE, 7; PARTITION, 1, 2; RAILROAD, 17.

REVIEW OF JUDGMENT.

See JUDGMENT; REMEDIES, 1, 2.

REVOCATION.

See DIVORCE, 3; RAILROAD, 8.

SALE.

See CITY, 13 to 17, 19 to 21; CONVERSION; INTOXICATING LIQUOR; PRINCIPAL AND SURETY, 3; SHERIFF'S SALE; TAXES, 6 to 8.

SCHOOL LANDS.

1. *Grant of Section Sixteen to Townships.—Seizin.*—The act of Congress of April 19th, 1816, granting section number sixteen in each township to the inhabitants thereof for the use of the schools, vested an immediate seizin. *Daggett v. Bonewitz, 276*
2. *Same.—Patent.—When Not Effective.*—A patent to land previously disposed of by the government is without effect. *Ib.*
3. *Same.—Acceptance of Grant.—Withdrawal.*—A grant of lands by the government can not be withdrawn after acceptance. *Ib.*
4. *Same.—Substitution of Other Lands.*—An attempted substitution by public officers of other lands for those in section sixteen would be without effect, except where the lands in that section had been disposed of by the government previous to the grant for school purposes. *Ib.*

SCHOOLS.

See PLEADING, 10; SCHOOL LANDS; TOWNSHIP TRUSTEE.

1. *Common Schools.—Report Required of Teacher at End of Term.—Contract.—Wages.*—When persons contract with township trustees to teach public

schools, the statute (section 4449, R. S. 1881), which requires them at the expiration of their terms to make a report to the trustees upon certain things, enters into and becomes a part of the contract, and until such report is made they are entitled to receive only seventy-five per centum of their agreed wages. *Owen School Tp. v. Hay*, 351

2. *Same.*—*Compliance with Condition.*—*Burden of Proof.*—Where, by the terms of the contract, the making of the required report is made a condition precedent to the payment of any wages, the burden is on the teacher, in an action on the contract, to show compliance with the condition, or a waiver by the trustee of so much as relates to seventy-five per centum, to entitle him to a judgment. *Id.*

SET-OFF.

1. *Action on Promissory Note.*—*Reply of Account as Set-Off to Set-Off Pleaded by Defendant.*—One who has a note and an account against another, may sue upon the note, and reply the account as a set-off against an equal amount pleaded as a set-off by the defendant. *Blount v. Rick*, 238
2. *Same.*—*Replied Set-Off Need not be Held when Action Commenced.*—Where a set-off has been pleaded by the defendant, the plaintiff may reply, by way of set-off to the defendant's plea, any claim held by him at the time such plea was filed. It is not necessary that the claim replied should be held by the plaintiff at the time his action was commenced. *Id.*

SEWER.

See CITY, 1 to 10.

SHERIFF'S SALE.

1. *Wife's Interest in Real Estate.*—*Act of March 11th, 1875.*—*Tenants in Common.*—Where a sale of real estate is made upon a judgment rendered against a husband alone, after the act of March 11th, 1875 (R. S. 1881, section 2508), took effect, whether the judgment was rendered on a contract made before or after the taking effect of such act, the inchoate one-third interest of the wife becomes absolute, as of the date of the sale, in the event of a failure to redeem, and she and the purchaser are thereafter tenants in common. *Buser v. Shepard*, 417
2. *Same.*—*Sale of Husband's Property.*—*Redemption by Wife.*—In such case the wife has no right to redeem from an execution sale of her husband's two-thirds interest in the land, as such right exists only in favor of one who has such an interest that the right to redeem is necessary for its protection. *Id.*
3. *Same.*—*Mechanic's Lien Previously Acquired Not Affected by Act of 1875.*—Where a mechanic's lien had attached prior to the taking effect of the act of March 11th, 1875, and the foreclosure and sale were subsequent thereto, such act does not apply, and the wife takes no rights thereunder. *Id.*
4. *Same.*—*What Complaint to Redeem Must Show.*—A bill to redeem must show on its face that the person seeking to exercise the right has a subsisting interest in the land, derived from the person whose contract or obligation created the lien, or that such interest in some way springs out of the general equity of redemption of such person. *Id.*
5. *Same.*—*Insufficient Complaint.*—A complaint by a wife who seeks to redeem from an execution sale, which merely shows that at the time of the sale her husband was the fee simple owner of the real estate, and that she was his wife, and not a party to the judgment, does not state a case entitling her to redeem after the year allowed by statute. *Id.*
6. *Same.*—*Purchaser Pendente Lite.*—One who acquires an interest in property while it is the subject of litigation, is as conclusively bound

by the result of a pending suit, as if he had been a party to it from the outset, and his right to redeem must be exercised within one year from the date of the sale. *Ib.*

7. *Effect of Receipt by Purchaser of Part of Redemption Money.—Lien.*—The purchaser of real estate at sheriff's sale is not bound to receive less than the whole amount of the redemption money; but if he receives a part, he thereby surrenders his right to enforce a forfeiture under the statute, and converts his purchase into a mere lien to secure the payment of the balance of the redemption money.
Ringle v. First Nat'l Bank, 425
8. *Same.—Suit by Purchaser to Enforce Lien.—Deed.*—In such case it is not necessary to the purchaser's cause of action to enforce his lien, that he should take a deed to the real estate from the sheriff, as such deed would not strengthen the lien. *Ib.*
9. *Same.—Statute of Limitations.*—The ten years' statute of limitation does not apply to a suit by the purchaser at a sheriff's sale to enforce his lien. *Ib.*
10. *Defective Description.—Statute of Limitations.*—Where the purchaser at a sheriff's sale takes possession of the land actually sold, and he and his grantees remain in uninterrupted possession for ten years, the title so acquired can not be afterwards disturbed, even if the description was so defective as to make the sale void. *Souders v. Jeffries, 552*
11. *Same.—Action for Possession.*—Where, however, the purchaser takes possession of land entirely different from that sold by the sheriff, the ten years' statute of limitation is not available to defeat an action by the owner for possession. *Ib.*

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 2.

SLANDER.

1. *Charge of Fornication or Adultery.*—It is slander to falsely charge a woman with fornication or adultery, whether in direct terms or by the use of words which impute the offence and are so understood by the hearers. *Buscher v. Scully, 246*
2. *Same.—Variance.*—A variance in the tense of the libellous words as charged in the complaint, and as shown by the evidence, will not preclude a recovery. *Ib.*

SPECIAL FINDING.

See GUARDIAN AND WARD, 7.

1. *Practice.—General Verdict.—Judgment Non Obstante.*—A judgment notwithstanding the general verdict will not be rendered on a special finding of facts which is vague and indefinite, and not so inconsistent with the general verdict as to control it. *Sanders v. Weelburg, 266*
2. *Same.—Presumptions.*—All reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings. *Ib.*
3. *Practice.—When Error in Conclusion of Law not Available.*—If the ultimate judgment is right and is sustained by the special finding of facts, an error in one of the conclusions of law will not justify a reversal. *Slauter v. Favorite, 291*
4. *When will Control General Verdict.*—It is only where the special findings of facts, when construed together, are irreconcilably inconsistent with the general verdict, that the former will control. *Redelsheimer v. Miller, 485*
5. *Same.—Presumptions.*—All reasonable presumptions will be indulged

in favor of the general verdict, but nothing will be presumed in aid of the special findings. *Ib.*

6. *When will Control General Verdict.*—It is only where the special findings of facts are irreconcilably inconsistent with the general verdict, with all reasonable presumptions in its favor, that the former will control the latter. *McComas v. Haas, 512*

SPECIAL JUDGE.

See INJUNCTION, 3.

STARE DECISIS.

See FEES AND SALARIES, 2.

STATUTE.

See APPEAL, 1, 3; BILL OF EXCEPTIONS; BOND; CHANGE OF VENUE; CITY, 12, 13, 15, 18 to 20; CONTINUANCE; CONVEYANCE, 2; CORPORATION, 1; CRIMINAL LAW, 20, 21, 29, 30; DECEDENTS' ESTATES, 3, 4, 6, 8; DESCENT, 2, 4; DRAINAGE; FEES AND SALARIES; GRAVEL ROAD, 4; HUSBAND AND WIFE, 5, 7; INJUNCTION, 2; INSTRUCTIONS TO JURY, 8; INTOXICATING LIQUOR, 3; JURISDICTION; MARRIED WOMAN; PLEADING, 4, 6, 8; PROMISSORY NOTE, 5; QUIETING TITLE, 1; RAILROAD, 2; SCHOOLS, 1; SHERIFF'S SALE, 1 to 3; STATUTE OF FRAUDS; TAXES; TURNPIKE, 1; WITNESS, 4, 5.

1. *Constitutional Law.—Retrospective Legislation.—Curative Statutes.*—There is no inhibition in the State Constitution against the passage of retrospective statutes, and such legislation, of a curative character, which is in accord with justice, equity and sound public policy, and which does not materially interfere with or overthrow vested rights, imposes no new burdens, and does not infringe upon the judicial department of the government, will be upheld. *Johnson v. Board, etc., 15*
Ellingham v. Board, etc., 600
2. *Same.—Jurisdiction.*—Such statutes will not be sustained where they purport to legalize proceedings had without jurisdiction over the subject-matter or the person, and where there was an entire lack of power on the part of the court, body, or officer, whose proceedings are sought to be legalized. *Ib.*
3. *Same.—Legislative Discretion.—General Rule.*—Where the thing omitted or irregularly done in the proceedings sought to be legalized by a curative statute, is something, the necessity for which the Legislature might have dispensed with or made immaterial by a prior statute, it is competent to dispense with it or declare it immaterial by subsequent legislation. *Ib.*
4. *Same.—Special Legislation.*—Except where the case falls within the cases enumerated in section 23, article 4, of the Constitution, the Legislature is the sole judge as to whether or not a general law can be made applicable, and when in such cases the legislative judgment is expressed that special legislation is required, and a special curative or retrospective statute is, under such circumstances, enacted, it will be upheld. *Ib.*
5. *Same.—County Commissioners.—Free Gravel Road.—Act Legalizing Establishment of.*—An act of the Legislature, legalizing the action of a board of commissioners in the establishment of a free gravel road, is in no sense a special law "for laying out, opening, and working on, highways," within the meaning of section 22, article 4, of the Constitution. *Ib.*
6. *Same.—Legalizing Act of April 11th, 1885, Constitutional.*—The act of April 11th, 1885, legalizing the action of the board of commissioners

of Wells county, in relation to the construction of the Bluffton and Rockford gravel road, etc. (Acts 1885, p. 178), is not an infringement by the legislative upon the judicial department of the State government, and is constitutional and valid. *Id.*

7. *Construction.—Legislative Intention.*—In construing a statute the probable intention of the Legislature must be kept constantly in view. *Sout v. Board, etc., 345*
8. *Same.—When Intention Governs Letter.*—The legislative intention, as collected from an examination of a statute, will prevail over the literal import of particular terms, and the strict letter of the statute, when an adherence to the letter would lead to injustice, absurdity, or contradictory provisions. *Id.*
9. *Same.—Uncertainty.—Legislative History.*—Where a statute is of uncertain meaning, by reason of obscurity in its phraseology, a recurrence to the circumstances under which it was passed may be had to ascertain the probable intention of the Legislature in enacting it, and to that end the legislative history of the statute may be inquired into. *Id.*
10. *Same.—Contemporaneous Legislation.*—In case of doubt or uncertainty, acts *in pari materia*, passed either before or after and whether in force or not, and contemporaneous legislation, not precisely *in pari materia*, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions. *Id.*
11. *Same.—History of Country.—Judicial Notice.*—The history of a country, its topography and general condition are elements which enter into the construction of the laws made to govern it, and are matters of which the courts will take judicial notice. *Id.*

STATUTE CONSTRUED.

See CRIMINAL LAW, 21; FEES AND SALARIES; MINER'S LIEN; STATUTE.

STATUTE OF FRAUDS.

See CITY, 13.

Not Available to Third Person.—A third person can not make the statute of frauds available to overthrow a transaction between other persons.

Burrow v. Terre Haute, etc., R. R. Co., 432

STATUTE OF LIMITATIONS.

See CONTRACT, 1; DECEDENTS' ESTATES, 2, 5; SHERIFF'S SALE, 9 to 11; TURNPIKE, 1.

STAY OF PROCEEDINGS.

See APPEAL, 2.

STREET.

See CITY, 18; NEGLIGENCE, 8 to 10; QUIETING TITLE, 3.

Church Property.—Liability for Street Improvement.—Church property is subject to assessment for the improvement of a street on which it is situate. *Rausch v. Trustees, etc., 1*

SUMMONS.

See CORPORATION, 1.

SUPREME COURT.

See APPEAL; ARGUMENT OF COUNSEL; BILL OF EXCEPTIONS; CRIMINAL LAW, 4, 7, 23; DIVORCE, 2; NEW TRIAL, 5; PLEADING, 2, 3, 10, 13, 20, 21; PRACTICE, 1, 2, 5 to 10; REPLEVIN, 2.

1. *Rehearing.—Practice.*—The Supreme Court will not grant a rehear-

- ing on questions not urged in argument before the decision in the cause, and, in this case, such questions will not be considered after a rehearing has been granted on other grounds. *Wasson v. First Nat'l Bank*, 206
2. *Findings in Suits in Equity Considered as in Other Cases.*—The Supreme Court, under the existing civil code, is bound to give the same respect to the finding of the trial court in a suit in equity that is given to the verdict of a jury or the finding of a court in an action at law. *Lake Erie, etc., R. W. Co. v. Griffin*, 464
 3. *What Errors Not Available.*—*Practice.*—Questions not presented to the trial court can not be made available on appeal. *Moore v. Harland*, 474
 4. *Sufficiency of Evidence.*—Where there is evidence sustaining the finding of the court, it will not be disturbed. *Ib.*
 5. *Judgment Resting on Good Paragraphs.*—Where the record on appeal affirmatively shows that the judgment rests on two good paragraphs of complaint, it is immaterial whether a third is, or is not, sufficient. *Bloomfield R. R. Co. v. Van Stike*, 480
 6. *Practice.*—*Agreement as to Question Presented.*—Where parties, by an agreement entered of record, definitely submit a single question to the trial court, they can not on appeal present any other. *Ib.*
 7. *Questions of Jurisdiction Over Subject-Matter.*—*When May be Raised.*—The rule that the question of jurisdiction over the subject-matter of the action can be raised at any time, does not apply to a case in which the record is fully made up for a final adjudication, upon other questions, in an appellate court. *Patterson v. Scottish American Mortgage Co.*, 497
 8. *Same.*—*Appeal from Marion Superior Court.*—*Assignment of Error.*—Upon an appeal to the Supreme Court from the superior court of Marion county, the only error which can be assigned is, that the superior court at general term erred in affirming or reversing the judgment rendered at special term. *Ib.*
 9. *Same.*—*Pleading.*—*Judgment.*—*New Trial.*—Errors in rulings upon the pleadings and upon the judgment are not causes for a new trial, but, to be available on appeal, must be separately assigned. *Ib.*
 10. *Judgment.*—*Objections to Must be Made in Trial Court.*—Objections to the form or substance of a judgment or order can not be made in the Supreme Court for the first time; and if not made in the trial court, or unless some motion to modify or amend be there interposed, they are not available for reversal, however erroneous the judgment or order may appear to be. *Carrothers v. Carrothers*, 530

SURETY.

See BOND; GUARANTY; HUSBAND AND WIFE, 5 to 7; MARRIED WOMAN; PRINCIPAL AND SURETY.

SURVEY.

See EVIDENCE, 8; RAILROAD, 4.

TAXES.

1. *Deduction of Debts from Moneyed Capital.*—*National Bank Stock.*—*Discrimination.*—Where the tax law of a State allows taxpayers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the State in the hands of its citizens, but denies to the owners of national bank stock the right to deduct their debts from the assessed value of such stock, it is such a discrimination, in view of the provisions of section 5219, R. S. United States, relating to national banks, as renders the State law to that extent inoperative. *Wasson v. First Nat'l Bank*, 206
2. *Same.*—*Tax Law of 1881.*—*Provision as to Deduction of Debts.*—*Material Discrimination.*—*Judicial Notice.*—Under the tax law of 1881, a taxpayer

may deduct his *bona fide* debts from all his moneyed capital and credits, except money on hand or on deposit, money loaned, bonds, and shares of stock in corporations, and the courts will take judicial notice of the fact that the moneyed capital from which the taxpayer may so deduct his debts is a material portion of the whole moneyed capital of the State. *Ib.*

3. *Same.*—*Debts May be Deducted from Assessed Value of National Bank Stock.*—In the assessment and taxation of shares of national bank stock, the owners thereof, if they have no other moneyed capital or credits from which to deduct their *bona fide* debts, are entitled to deduct them from the assessed value of such shares of stock, notwithstanding the provisions of the tax law of 1881. *Ib.*
4. *Same.*—“*Money at Interest.*”—“*Money Loaned.*”—The phrase “money at interest,” as used in the tax law of 1881, is the equivalent of “money loaned.” *Ib.*
5. *Same.*—*Schedule Controls in Case of Conflict.*—The schedule provided by the tax law controls in case of conflict with any other portion of that law. *Ib.*
6. *Refunding by County.*—*Purchaser at Sale.*—*Reduction of Lien at Suit of Owner.*—Sections 5813 and 5814, R. S. 1881, which provide for the refunding of taxes by the county to the owner of land, where the same have been paid in pursuance of a wrongful assessment, furnish no remedy to a purchaser at a tax sale whose lien is reduced at the suit of the land-owner. *Hilgenberg v. Board, etc., 494*
7. *Same.*—*Remedy of Purchaser.*—The purchaser at a tax sale, to make a case under section 6487, R. S. 1881, for the refunding of taxes paid by him, must show either that the land was not subject to taxation, or that the taxes had been paid before the sale. *Ib.*
8. *Same.*—*Complaint.*—The remedy of the purchaser at a tax sale is wholly statutory, and unless he can bring his complaint within some provision of the statute it will be bad. *Ib.*

TELEGRAPH COMPANY.

1. *Statutory Penalty.*—*Complaint.*—*Matter of Defence.*—A complaint against a telegraph company, to recover the statutory penalty for failing to transmit a message, need not aver that the person to whom the message was directed lived within one mile of the receiving station or within the town or city in which such station is situate, as this is matter of defence. *Western U. Tel. Co. v. Buskirk, 549*
2. *Same.*—*Receiving Message from Agent.*—*Authority to Sign Sender's Name.*—*Estoppel.*—Where a telegraph company receives a message and the money for its transmission from a person other than the sender, without objection, it can not, in an action by the latter to recover the penalty for failure to transmit, question the authority of such person to sign the sender's name. *Ib.*

TENANTS BY ENTIRETIES.

See DECEDENTS' ESTATES, 4; HUSBAND AND WIFE, 7, 8.

TENDER.

See CITY, 18.

TIME.

See GRAVEL ROAD, 2; OFFICE AND OFFICER, 6, 7.

TITLE.

See EVIDENCE, 2, 9; MORTGAGE, 7; PARTITION; QUIETING TITLE; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER.

TORT.

See CONVERSION; NEGLIGENCE; SLANDER.

TOWN.

See CITY; NEGLIGENCE, 8 to 10; STREET.

TOWNSHIP.

See ELECTIONS.

TOWNSHIP TRUSTEE.

See OFFICE AND OFFICER, 6.

1. *School Township.—Contracts of Trustee.—Notice.*—In dealing with the trustee of a school township, all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by contracts which are shown to be authorized by law.
Bloomington School Tp. v. National School Furnishing Co., 43
2. *Same.—School Supplies.—Complaint on Contract for.—Necessary Averments.*—A complaint against a school township, on a contract for school supplies, to be good must allege that such supplies are necessary and suitable for the use of the public schools of the township, and that they have been delivered to and accepted by such township. *Id.*

TRESPASS.

See RAILROAD, 4.

TRIAL.

See CRIMINAL LAW, 4, 28; DRAINAGE, 11, 12; NEW TRIAL; PRACTICE, 3; PRINCIPAL AND SURETY, 1.

TRUST AND TRUSTEE.

See PRINCIPAL AND SURETY, 2.

TURNPIKE.

See CORPORATION, 2; GRAVEL ROAD.

1. *Written Contract.—Assessments on Stock.—Statute of Limitations.—Pleading.*—Where one signs the articles of association of a turnpike company, formed under section 3624, *et seq.*, agreeing therein to take and pay for a certain amount of stock, it is a written contract, the statute entering into and becoming a part of it, and an answer of the six years' statute of limitation, to a complaint to recover an assessment on the stock, is bad. *Falmouth, etc., T. P. Co. v. Shawhan, 47*
2. *Same.—May Use Line Abandoned by Another Company.—Repairs.*—A turnpike company, organized to construct a road, may take the line abandoned by another company, and to keep its road in repair it may call in stock subscriptions. *Id.*

VARIANCE.

See CRIMINAL LAW, 38, 39; SLANDER, 2.

VENDOR AND PURCHASER.

See CONVEYANCE; DECEDENTS' ESTATES, 2, 5, 9, 10; DEED; DESCENT, 3; EVIDENCE, 2, 9; MARRIED WOMAN; RAILROAD, 7; REAL ESTATE; SHERIFF'S SALE.

VENIRE DE NOVO.

See INTERROGATORIES TO JURY, 6.

VENUE.

See CHANGE OF VENUE.

VERDICT.

See SPECIAL FINDING.

VEXATIOUS ACTION.

See ABATEMENT.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WAIVER.

See NOTICE.

WARRANTY.

See CONVEYANCE; LIFE INSURANCE; REAL ESTATE, 1 to 4.

WAYS.

See EVIDENCE, 10; GRAVEL ROAD; REAL ESTATE, 5, 6; STREET; TURNPIKE.

WIDOW.

See DECEDENTS' ESTATES, 3, 4, 6, 8 to 10; DESCENT; PARTITION, 2; REAL ESTATE, ACTION TO RECOVER, 2; WILL; WITNESS, 4.

WILL.

See DECEDENTS' ESTATES, 6; PROMISSORY NOTE, 2; REAL ESTATE, ACTION TO RECOVER.

Devise to Wife During Widowhood, and then to Heirs of Testator.—Where a testator devises real estate to his wife so long as she remains his widow, after which it is to be equally divided among his heirs, the widow's estate ceases at her marriage, and she can not claim as an heir on its termination. *Wood v. Beasley, 37*

WITNESS.

See CRIMINAL LAW, 32, 36.

1. *Expert Testimony, Competency of.*—*Practice.*—It is for the trial court to determine whether or not a witness is qualified to testify as an expert, and the question of his competency is so exclusively for the court that its action will not be reviewed, except where there is no evidence tending to prove the qualification of the witness, or there is a palpable abuse of discretion. *City of Fort Wayne v. Coombs, 75*
2. *Same.*—*Preliminary Cross-Examination of Expert.*—If the evidence satisfies the trial court of the qualification of the witness, it is not bound to permit a preliminary cross-examination on the question of competency, though it has a right to do so, which right should be liberally exercised. *Id.*
3. *Same.*—*Qualification of Expert.*—The study of a profession or business, without practical experience, will qualify a witness as an expert. *Id.*
4. *Same.*—*Widow.*—*Competency as Witness.*—A widow is a competent witness for the plaintiff in an action by the administrator of her husband against a railroad company to recover damages for negligently causing his death. Sections 498 and 499, R. S. 1881, do not apply to such actions. *Louisville, etc., R. W. Co. v. Thompson, 448*
5. *Heirs.*—*Declarations of Ancestor.*—*Conveyance.*—*Gift.*—*Advancement.*—*Presumption.*—In a suit for the partition of real estate of which the ancestor died seized, an heir, who is a party to the suit, is not a com-

petent witness to prove declarations of the ancestor at the time of making certain conveyances to his children, in order to show that the conveyances were gifts, and not advancements as the law presumes. Section 499, R. S. 1881. *Wolfe v. Kable, 565*

WORDS AND PHRASES.

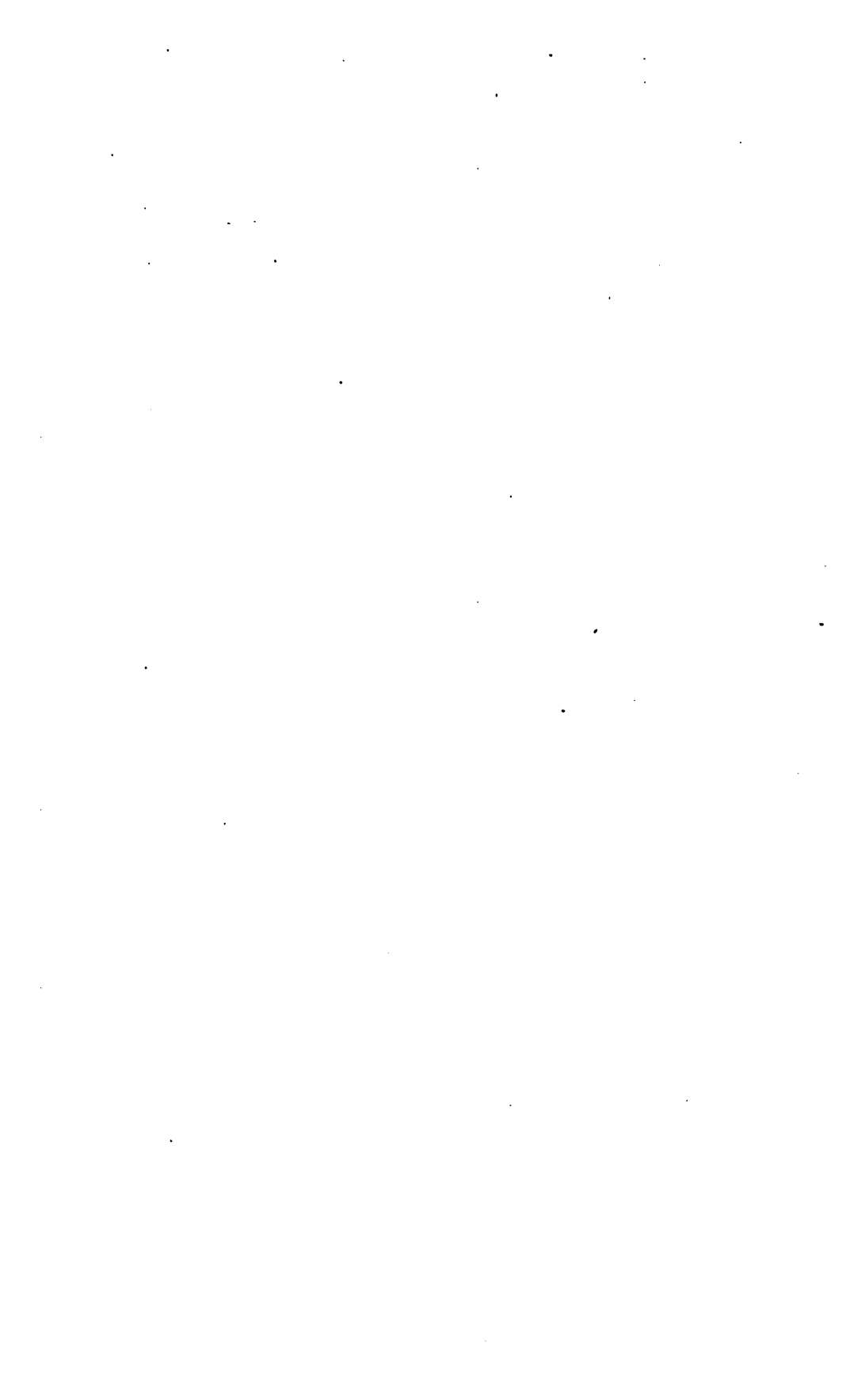
See BOND; CITY, 19 to 21; EVIDENCE, 8; TAXES, 4.

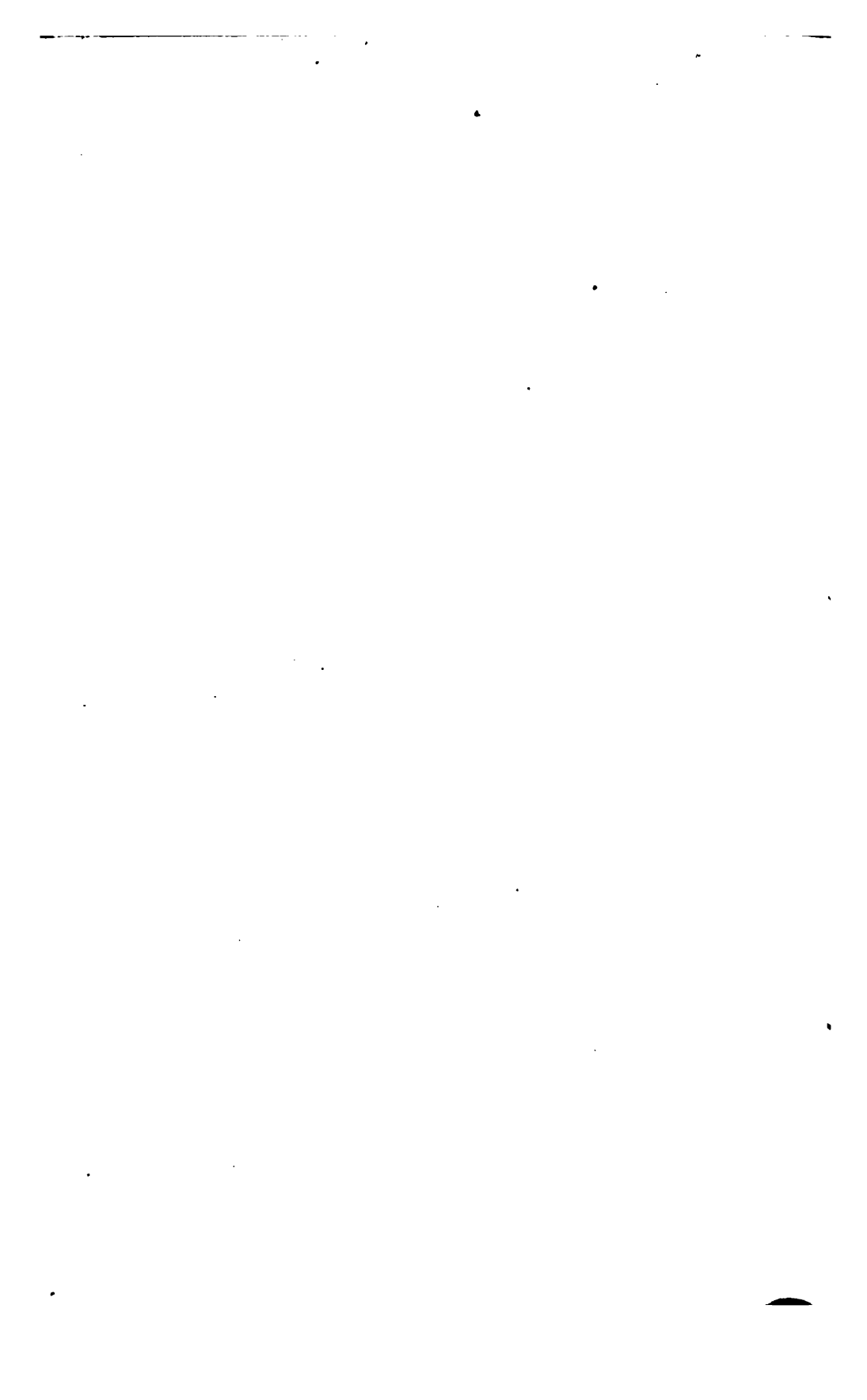
WRITTEN INSTRUMENT.

See APPEAL, 1; CITY, 15; CONTRACT, 3; INSTRUCTIONS TO JURY, 2; PLEADING, 6, 8, 11.

END OF VOLUME 107.

Ex. 1. 1.





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